IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1002

VICTOR GUZMAN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable Dennis Murphy, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R." All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The relevant facts and procedings are set forth in the initial brief on the merits.

SUMMARY OF THE ARGUMENT

I. The death sentence imposed on Mr. Guzman violates the Sixth Amendment as interpreted by *Hurst v. Florida*, 136 S.Ct. 616 (2016). On its face, and as interpreted by the Supreme Court in *Hurst*, section 921.141 requires the judge alone to find the facts necessary to impose the death penalty, including the existence of aggravators, the sufficiency of those aggravators to impose the death penalty, and weather mitigating circumstances outweigh the aggravating circumstances. *See* 921.141(3) (2000); *Hurst* at 623. The sentence in this case is based entirely on judicial factfinding in violation of *Hurst* and the Sixth Amendment.

This error cannot be held harmless. This is not a case where a single, uncontested element was not submitted to the jury. Instead, Mr. Guzman was denied a jury trial on any of the elements necessary to make him eligible for the death penalty. The harmless error doctrine does not apply where, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The error also cannot be harmless under the Eighth Amendment. The Eight Amendment prohibits a death sentence based "on a determination by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell v.*

Mississippi, 472 U.S. 320, 328-29 (1985). In light of *Hurst*, it is clear that the jury was misled as to the significance of its factfinding. This court has already decided that such an error would mandate resentencing.

II. A death sentence imposed on anything less than a unanimous jury verdict violates the Eighth Amendment. Apart from Florida, only two states permit a death sentence based on a nonunanimous jury verdict. The fact that only three states permit this result demonstrates a societal judgment against reliance on nonunanimous juries.

III. On remand, Mr. Guzman must be resentenced to life imprisonment. First, the death penalty in effect at the time of this crime is unconstitutional. The statute just adopted by the Legislature purports to create an "eligibility" statute that would decrease the elements necessary to impose a death sentence. Application of the new statute would therefore violate the constitutional prohibitions against giving retrospective effect to criminal statutes. U.S. Const. Art. I § 10 cl. 1; Art. X, § 9, Fla. Const.

Second, Mr. Guzman would be entitled to the benefit of the original 7-5 recommendation at any resentencing under the newly-adopted statute, requiring a sentence of life in prison.

IV. Section 775.082 independantly requires that Mr. Guzman be resentenced to life in prison. It unambiguously requires that prisoners already sentenced to death be resentenced to life without parole in the event that the Florida death penalty is declared unconstitutional. This Court has already discussed the statute in the context of a decision finding the *procedures* for arriving at a death sentence unconstitutional. The Court determined that it operates to commute existing death sentences.

concluded that the statute

ARGUMENT

I. THE DEATH SENTENCE IN THIS CASE, BASED ON JUDICIAL FACTFINDING SUPPORTED ONLY BY AN UNELABORATED 7-5 JURY RECOMMENDATION, VIOLATES THE SIXTH AMENDMENT UNDER *Hurst v. Florida*.

The Sixth Amendment requires that the jury find *all* the facts necessary to impose the death penalty. In Florida those factual findings include: That sufficient aggravating circumstances exist to warrant the death penalty, and that there are insufficient aggravating circumstances to outweigh the aggravating circumstances. § 921.141(3) (2000). The statute itself refers to these determinations as factfinding:

> (3) **Findings in support of sentence of death.** … [the court] shall set forth in writing its findings upon which the sentence of death is based as to the **facts**:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

The statute goes on to require "specific written findings of fact."

In *Hurst v. Florida* the Supreme Court held that the Sixth Amendment requires that these two factual findings – sufficiency of aggravating circumstances and the weighing of mitigation against aggravation – must be made by a jury. *Hurst v. Florida*, 136 S.Ct. 616 (2016). It expressly rejected the idea that a jury finding of an aggravator is sufficient jury factfinding to make a defendant eligible

for death. The Court noted: "The State contends that this finding [of an aggravating circumstance] qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*." *Hurst* at 623. The Court rejected the State's position:

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

Id.[1] This holding should come as no surprise. Even before *Ring*, Justice Rehnquist explained:

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[1] Though this is clear enough, it is worth noting that *Hurst*'s author has previously referred to these determinations as factfinding under Alabama's death penalty statute:

> And a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.

Woodward v. Alabama, 134 S.Ct. 405, 411 (2013) (Sotomayor, J., dissenting from denial of certiorari) (citations omitted).

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Barclay v. Florida, 463 U.S. 939, 954 (1983).

The death sentence in this case was the product of judicial factfinding. The judge engaged in extensive factfinding before determining that Mr. Guzman could and should be sentenced to death. As established in the Initial Brief, much of that factfinding was erroneous or inadequate. Nevertheless, the judge found that aggravating circumstances existed assigned them weight, found certain mitigating circumstances existed, and found the aggravating circumstances outweighed the mitigation. (R. 2071-80). The judge engaged in this factfinding "without the assistance of a jury's findings of fact." *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled*, *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Hurst* at 622.

The use of an unconstitutional statute to sentence Mr. Guzman to die cannot be harmless. The State has argued elsewhere that the Court should apply *Neder v. United States*, 527 U.S. 1, 8 (1999), which held that failure to submit to the jury a single, uncontested element for which there is overwhelming evidence may be found harmless beyond a reasonable doubt. Here, much more than a single, uncontested element was left out. The jury was instructed that it was merely

providing advice, not returning a "a verdict" at all. It was never told that it would have to find the elements of sufficient aggravation and weight beyond a reasonable doubt.

In this respect, the error here is exactly like the one posited by the Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The Court stated, "It would not satisfy the Sixth Amendment to have a jury determine that a defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship*[2] requires) whether he is guilty beyond a reasonable doubt." *Id.* at 278 (emphasis in the original). Here, as in *Sullivan*, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280. Because of this, the harmless error doctrine cannot apply, and *Hurst* error is *per se* reversible. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action …" *Id.* at 281. *See also Combs v. State*, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the sentencing judge can only speculate as to what factors the jury found in making its recommendation. . . ."); *Johnson v. State*, 53 So. 3d 1003, 1007-08 (Fla. 2010) (dispensing with harmless error application based on "sheer speculation"), as revised on denial of reh'g (Fla. 2011).

The error in this case also connot be harmless under the Eighth Amendment. "[I]t is constitutionally impermissible to rest a death sentence on a determination

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[2] *Winship v. State*, 397 U.S. 358 (1970).

made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Mr. Guzman's jury was repeatedly instructed that their recommendation was merely advisory, and that the responsibility for deciding the sentence rested with the judge. To date, this Court has rejected *Caldwell* challenges because the existing jury instructions are correct when they state that the responsibility for determing the sentence rests with the judge. *See Combs*, 525 So. 2d 857-58. *Hurst*, however, teaches that a jury's "recommendation" reflects factfinding necessary for the judge to impose death and *Caldwell* applies. This Court has already anticipated the result:

> If we were to apply *Caldwell* … we would necessarily have to find that our standard jury instructions, as they have existed since 1976, violate the dictates of Caldwell. This would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976.

Combs at 858.

II. THE EIGHTH AMENDMENT REQUIRES THAT DEATH SENTENCES BE IMPOSED ONLY PURSUANT TO A UNANIMOUS JURY VERDICT.

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amend. VIII. The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy*

v. Louisiana, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting). To gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Furman*, 408 U.S. at 239.

There is a nationwide consensus against non-unanimous jury verdicts in capital cases. Only two states besides Florida – Alabama and Delaware – permit a jury's sentencing determination to be less than unanimous. *See* Ala. Code § 13A-5-46 (f)(requiring a minimum jury recommendation of 10-2 in favor of death); 11 Del. C. § 4209 (sentence recommendation must contain a vote of the jurors, with no minimum requirement for number). The validity of those statutes is increasingly in question. *See Woodward v. Alabama*, 134 S.Ct. 405 (2013) (Sotomayor, J., dissenting from denial of certiorari); *Brooks v. Alabama*, 136 S.Ct. 708 (2016) (Sotomayor, J. and Ginsburg, J. concurring in denial of certiorari) and (Breyer, J., dissenting from denial of certiorari); *Zebrowski v. Pierce*, 1:03-CV-00853-LPS, 2016 WL 697614, at *1 n.1 (D. Del. 2016) (discussing stay of Delaware capital trials pending resolution of statute's constitutionality in light of *Hurst*.

Even assuming the validity of these statutes, that only three out of thirty-one states permit non-unanimous jury verdicts in capital cases weighs heavily against its constitutionality. As in *Hall v. Florida*, 134 S.Ct. 1986, 1996-2000 (2014),

which also addressed procedures adopted by only three death penalty states, the scarcity of state laws permitting non-unanimous capital sentencing is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." 134 S.Ct. at 1998; *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.").

III. ON REMAND THE TRIAL COURT MUST RESENTENCE MR. GUZMAN TO LIFE IMPRISONMENT BECAUSE THERE IS NO CONSTITUTIONAL DEATH PENALTY STATUTE THAT CAN BE APPLIED TO HIM AND HE IS ENTITLED TO THE BENEFIT OF THE ORIGINAL 7-5 RECOMMENDATION.

This case must be remanded with instructions to enter a sentence of life without parole. There is no constitutional death penalty statute that can be applied to Mr. Guzman's case. Section 921.41 as it existed prior to *Hurst* is unconstitutional and cannot be used to authorize a life sentence. Florida's new capital sentencing statute cannot be applied without violating the constitutional prohibition against giving retrospective effect to criminal statutes. U.S. Const. Art. I § 10 cl. 1; Art. X, § 9, Fla. Const. If the Court does hold that chapter 2016-13

may be applied, Mr. Guzman is entitled to the benefit of the 7-5 recommendation he has already received.

A. Chapter 2016-13 Alters The Degree Of Proof Necessary To Impose The Death Penalty, In Violation Of The Prohibition Against Ex Post Facto Laws.

Mr. Guzman was entitled to a jury verdict as to 1) The existence of aggravating circumstances; 2) Whether the aggravating circumstances were sufficient to warrant the death penalty; and 3) Whether the mitigating circumstances outweighed the aggravating circumstances. *See* Argument I, *supra*. On its face chapter 2016-13 denies him a jury verdict on the second and third elements. The amended statute has changed the degree of proof necessary to convict Mr. Guzman of the death penalty, and it cannot be applied to him on remand.

The ex post facto clause prohibits laws that are retrospective while also "disadvantage[ing] the offender affected by [them]. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). A defendant is "disadvantaged" when an amendment affects the "crime for which the [he] was indicted, the punishment prescribed therefor, and *the quantity or the degree of proof necessary to establish his guilt …*" *Hopt v. People,* 110 U.S. 574, 589 (1884); *see Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Glendening v. State*, 536 So. 2d 212, 215 (Fla. 1988).

Chapter 2016-13 unconstitutionally alters the degree of proof necessary to impose the death penalty. The former 921.141 conditioned a death sentence on factual findings that included the sufficiency of aggravation to warrant death, and whether mitigation outweighed aggravation. Chapter 2016-13 purports to eliminate these elements. It attempts to establish an "eligibility" statute where a defendant has no Sixth Amendment rights beyond the requirement that a single aggravator be proven beyond a reasonable doubt. *See* Ch. 2016-13, § 3; § 921.141(2)(b)(2) (If the jury … Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death …") By eliminating two of the three elements that must be proven to a unanimous jury beyond a reasonable doubt, the amended statute would retroactively alter "the degree of proof necessary."

Unlike the amendment at issue in *Dobbert*, chapter 2016-13 does not work a mere procedural change. In *Dobbert* the Supreme Court noted that the amendment "simply altered the methods employed in determinging whether the death penalty was to be imposed." 432 U.S. 282, 293-94. In *Dobbert* the statute went from one presuming death to one that interposed procedures and burdens effectively eliminating that presumption. At that there was no reason to even question whether the amendment impaired any Sixth Amendment with respect to factual findings necessary to to the imposition of a sentence.

Resentencing under 2016-13 would likewise violate Article X section 9 of the Florida Constitution. That section provides: "Repeal or amendment of a criminal statute shall not affect prosecution for any crime previously committed." The requirements of Article X section 9 are distinct from the Federal constitutional prohibition on ex post facto laws, but similar. The Florida Constitution first asks whether a change in law is "procedural" or "remedial," rather than substantive. *See Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007). Procedural or remedial laws are those dealing with modes of procedure, "which do note create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing …" *Id.* As argued above, chapter 2016-13 purports to eliminate the right to jury findings as to at least two of the elements of capital murder. This elimination of the prosecution's burden of proof necessarily violates Article X, section 9. *See Norman v. State*, 826 So. 2d 440 (Fla. 1st DCA 2002); *Foster v. State*, 861 So. 2d 434 (Fla. 2002); *see also*, *Carmell v. Texas*, 529 U.S. 513 (2000).

B. If He Is Resentenced Under Chapter 2016-13, Mr. Guzman Is Entitled To The Benefit Of The Jury's 7-5 Recommendation.

If he is resentenced under the new statute, Mr. Guzman is entitled to the benefit of the 7-5 sentencing recommendation – a recommendation that would

require a life sentence under chapter 2016-13. This Court has long held that when it orders resentencing, a defendant who received a life recommendation is entitled to the benefit of that recommendation. *See, e.g., Torres–Arboleda v. Dugger*, 636 So. 2d 1321, 1326 (Fla. 1994); *Heiney v. State*, 620 So. 2d 171, 174 (Fla. 1993); *Stevens v. State*, 552 So. 2d 1082, 1088 (Fla. 1989).[3,4] These cases stand for the principal that State does not receive a second chance to increase the number of votes for death. The prosecution should not get a second bite at the apple here.

Each of the cited cases deals involves a judge's decision to override a jury's life recommendation. In each, the Court found error that required that the defendant be resesentenced. In *Torres-Arboleda*, *Heiney*, and *Stevens*, trial counsel was ineffective for failing to develop evidence that would have supported the life recommendation and required the judge to follow that recommendation under *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). In *Porter* the Court held that the sentencing judge had not been impartial and ordered resentencing before a

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[3] The Court receded from *Torres-Arboleda*, *Heiney*, *Stevens*, and *Hall* in *Coleman v. State*, 64 So. 3d 1210, 1226 n.13 (Fla. 2011). The Court concluded that when it reverses an override of a jury recommendation on postconviction, it is no longer necessary to remand for the trial court to reconsider its decision to overrided the life recommendation. Instead, the Court now remands with directions to enter a life sentence. Nothing in *Coleman* retreats from the principle that a defendant is entitled to the benefit of a previous life recommendation.

[4] *See also, Porter v. State*, 723 723 So. 2d 191, 198 (Fla. 1998); *Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991); *Craig v. State*, 620 So. 2d 174, 176 (Fla. 1993); *Buford v. State*, 570 So. 2d 923 (Fla. 1990).

different judge. In *Craig*, a direct appeal, the Court ordered that a successor judge conduct a hearing before imposing sentence.[5] In each case the court held that the defendant was entitled to the prior jury's recommendation.

Mr. Guzman is likewise entitled to the benefit of the original 7-5 recommendation. In each of the cases cited above, the State had been unable to persuade 7 or more jurors to vote for death, and it was not permitted to try again. If Mr. Guzman is retried under chapter 2016-13, he could only be sentenced to death if ten or more jurors vote for death. The State has already had the opportunity to persuade twelve jurors to vote for death. It convinced only seven. The jury's vote must have preclusive effect under the double jeopardy clause: "Having received 'one fair opportunity to offer whatever proof it could assemble,' *Burks v. United States*, 437 U.S. [1], at 16, the State is not entitled to another." *Bullington v. Missouri*, 4451 U.S. 430, 446 (1981) (quoted in *Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991)[6]); U.S. Const. amends. V,VIII, XIV; Art. I, § 9,17, Fla. Const..

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[5] Craig had been convicted of two murders, and the original sentencing jury had recommended death for one killing and life imprisonment for the other. The Court ordered that a new sentencing jury be empaneled, but that it only recommend a sentence as to the count that had previously generated a death recommendation. Craig retained the benefit of the jury's original life recommendation on the second count.

[6] In *Wright* the Court held that where it determines that an overrided was improper, the jury's recommendation operates as an acquittal of the death penaly.

This same issue would arise if the Court remanded this case on another issue. For example, the Initial Brief establishes that there are numerous errors in the sentencing order. The remedy for these errors is normally remand to the trial court for the judge to reevaluate the aggravation and mitigation and – if he still believes a death sentence is appropriate – to prepare an adequate sentencing order. *See, e.g., Oyola v. State*, 99 So. 3d 431, 447 (Fla. 2012). Should this happen in this case, however, the trial court would be relying on an unconstitutional statute and constitutionally inadequate jury fact-finding support a death sentence. If the judge applied chapter 2016-13 when correcting his sentencing order, he would be faced with a 7-5 jury recommendation. The death penalty would not be authorized. To allow the judge to empanel a new jury in an attempt to get enough death-votes to support his order would violate both double jeopardy and due process.

This issue is not governed by the Court's general "clean-slate" approach to resentencings. *See, e.g., Preston v. State*, 607 So. 2d 404, 408-409 (Fla. 1992). Relying on *Poland v. Arizona*, 476 U.S. 147 (1986), this Court has held that double jeopardy and collateral estoppel do not bar the use of aggravators not found in the original sentencing or require the finding of any mitigator previously found. *Preston*; *Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993); *King v. Dugger*, 555 So. 2d 355, 358 (Fla. 1992). However, the Court has reached this conclusion by reasoning that an aggravating or mitigating circumstance "is not an 'ultimate fact'

that collateral estoppel or the law of the case would preclude being rejected on resentencing." *Preston*, 408-09. This case does not present a question of finding particular aggravating or mitigating circumstances. In the absence of a unanimity requirement, the "ultimate fact" is each juror's vote for life or death. That fact has been resolved: The State has won only seven death votes.

IV. CHAPTER 775.082 DIRECTS THAT MR. GUZMAN BE SENTENCED TO LIFE WITHOUT PAROLE.

The Legislature has decreed that Mr. Guzman be sentenced to life without parole in light of *Hurst*. In 1972, the Legislature enacted what is now section 775.082(2) That statute requires that if the Florida death penalty is declared unconstitutional, any person previously sentenced to death must be resentenced to life imprisonment. The Court has interpreted this statute to mean what it says, noting the Legislature's intention to resentence prisoners on death row to life imprisonment. Nothing in the ensuing forty years has indicated a change in the meaning of this subsection. The statute, amended and reenacted, requires now what it did in 1972: Prisoners like Mr. Guzman must be resentenced to life without parole.

In 1972, the Supreme Court declared the death penalty, as it was administered in many states, unconstitutional. *See Furman v. Georgia*, 408 U.S.

238 (1972); *State v. Dixon*, 283, So. 2d 1 (Fla. 1973). The Supreme Court's holding was a narrow one; it "did not abolish capital punishment." *Dixon* at 6. *Furman* only invalidated the *procedures* by which death sentences were imposed. This court has explained that, "the only controlling law which *Furman* … provides" is that "'[T]he imposition and carrying out of the death penalty In [these cases] constitute cruel and unusual punishment in violation Of the Eighth and Fourteenth Amendments.'" *Id.* at 239-40.

In anticipation of *Furman*'s outcome, the Legislature enacted chapter 72-118. That law amended section 775.082 by adding the following:

> (2) 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, a person who has been convicted of a capital felony shall be punished by life imprisonment.
>
> (3) 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 with no eligibility for parole.

Ch. 72-118, § 1, Laws of Fla. Chapter 72-118 became effective on October 1, 1972.

When *Furman* was decided in June 1972, this Court ordered all prisoners then under sentence of death for murder to be resentenced to life imprisonment. *See Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *In re Baker*, 267 So. 2d 331 (Fla.

1972). It did so before chapter 72-118 took effect. The Court observed that the purpose of the act was to "commute present death sentences:

> We have given general consideration to any effect upon **the current legislative enactment** [referencing § 775.082(3)] **to commute present death sentences** to become effective October 1, 1972. **The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated.** This provision is not before us for review and we touch on it only because of its materiality in considering the entire matter.[7]

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972) (emphasis added).

The Legislature has taken no action to change this language providing for commutation of death sentences. It has amended the provisions enacted by chapter 72-118, but has left "legislative commutation" unchanged. In 1974, the Legislature eliminated what was originally section 775.082(2), which dictated that in the event the death penalty was declared unconstitutional, defendants not yet sentenced to death should be sentenced to life imprisonment. Ch. 74-383, Laws of Fla. It retained the subsection relating to those already sentenced to death, and

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[7] Chapter 72-118 increased the life sentence that would be imposed when the death sentence was legislatively commuted to life *without* parole. The Court (with the support of the Attorney General) sought to avoid the litigation that would accompany the application of this increased alternative punishment to defendants sentenced to death for offenses committed before October 1972. *See Anderson*, 267 So. 2d at 9; *Baker*, 267 So. 2d at 333 n.4 ("The Petitioner asserts that the Attorney General, the several circuit judges, State attorneys, public defenders have all shown great concern and have worked hard and cooperatively to achieve these re-sentencings in a speedy manner, thereby avoiding unnecessary litigation as to the validity of C. 72-118.")

renumbered it as 775.082(2). In 1998, the Legislature amended 775.082(2) to add a second sentence: "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." Ch. 98-3, Laws of Fla. It left the first sentence untouched. Even when it amended sections 785.02 and 921.141 in response to *Hurst*, it left 785.02(2) intact. Nothing in the language or meaning of the provision has changed since this Court recognized that the subsection would require prisoners to be resentenced to life as a result of *Furman*'s invalidation of the procedures by which the death penalty was imposed.

CONCLUSION

For the foregoing reasons, the sentence of death must be vacated, and this cause must be remanded with directions to resentence Mr. Guzman to life in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Blair Dickert, Assistant Attorney General, Dept. of Legal affairs, 444 Brickell Ave, Suite #650, Miami, FL 33131 via the Court's e-filing portal on March 22, 2016.

/s/ Andrew Stanton
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

/s/ Andrew Stanton
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