No. 16-1252

In the
Supreme Court of the United States

State of Florida,

Petitioner,

v.

Paul Beasley Johnson,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the prerequisite findings which authorize the imposition of a death sentence in a given state are a matter of state law, which - - in the case of Florida - - has been resolved by the state Supreme Court to require additional findings beyond that of a single aggravating factor.

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STATEMENT

In its supplemental answer brief in Paul Johnson's direct appeal, the state framed the issue as "Because Johnson has multiple convictions for prior violent felonies, the United States Supreme Court opinion in Hurst v. Florida does not apply." [Respondent's appendix, p. 46a, 51a]. [Those convictions were for contemporaneous - - not previously occurring - - crimes. See Petitioner's appendix, p. 11a-12a, 21a]. In support of its interpretation of the Florida capital sentencing scheme, the state argued that that single aggravating factor was all that was needed under state law to obtain a death sentence:

> In Florida, enhancement to include the possibility of a death sentence is authorized once the existence of one aggravating factor has been established. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) ("To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As sentencing enhancement is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

[Respondent's appendix, p. 62a] (emphasis supplied, except under the word must)

In its opinion reversing for a new penalty phase proceeding, the Supreme Court of Florida agreed with Johnson that his death sentences violated Ring and Hurst[1] because his penalty jury "did not find the facts necessary to sentence him to death" [Petitioner's appendix, p. 9a]. The Florida Supreme Court expressly rejected the state's contention that Johnson's contemporaneous convictions for other violent felonies insulated his death sentences from Ring and Hurst. [Petitioner's appendix, p. 9a]. Because "the judge rather than the jury made all the necessary findings

[1] Ring v. Arizona, 536 U.S. 584 (2002); Hurst v. Florida, 136 S.Ct. 616 (2016).

to impose a death sentence" (emphasis supplied), the Florida Supreme Court went on to determine whether the state could meet its burden under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) of showing beyond a reasonable doubt that the error was harmless. [Petitioner's appendix, p. 10a-11a]. The court concluded that the state had not met that burden:

> The facts of this case obviously include substantial aggravation. Johnson set out on a drug-fueled hunt for money to purchase more drugs, so determined to succeed that "if he would have to shoot someone, he would have to shoot someone." Johnson murdered a taxi driver who had been dispatched to pick up a fare, a Good Samaritan who Johnson tricked into believing that his car was broken down, and a deputy sheriff who had stopped Johnson as a part of the manhunt for the perpetrator of Johnson's two earlier murders.
>
> However, "[t]he record in this case demonstrated that the evidence of mitigation was extensive and compelling." . . . Johnson suffered brain damage, making him more prone to drug dependency, and at the time of the murders was under the influence of a form of drug-induced psychosis and delirium. Following a lifetime of drug abuse that began at a very young age, Johnson had been ingesting marijuana and crystal methedrine on the night of the murders, which impacted his ability to appreciate the criminality of his conduct. Johnson's upbringing contributed to his problems. He was abandoned by his parents to his elderly grandparents after birth, and both Johnson's biological father and biological grandfather were violent alcoholics. Johnson was held back numerous times in school and never progressed beyond the seventh grade. Even before his birth, Johnson suffered: his mother was sick throughout the pregnancy and received little or no prenatal care; and Johnson's biological father regularly beat Johnson's mother while she was pregnant with Johnson. Over the past thirty years, Johnson has been a good prisoner with few disciplinary reports and has been very remorseful concerning the murders.

[Petitioner's appendix, p. 11a-13a]

In view of the "nonunanimous jury recommendation and a substantial volume of mitigation evidence" the state Supreme Court stated that, as in Hurst:

> . . . we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

[Petitioner's appendix, p. 13a]

Quoting the Arizona Supreme Court's decision in State v. Ring, 65 P.3d 915, 946 (Ariz. 2003), the Florida Supreme Court was unable to conclude "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency" [Petitioner's appendix, p. 13a]. Accordingly, the case was remanded for a new jury penalty proceeding.

REASONS FOR DENYING THE PETITION

The state - - in its instant petition for certiorari in Paul Johnson's case - - has asked this Court to grant certiorari in Timothy Hurst's case (no. 16-998), and to hold the instant petition pending its disposition of Hurst's petition. The state's petition in Hurst and Hurst's brief in opposition have been distributed for conference of May 18, 2017. If, after that conference, the state's petition is denied then its petition in the instant case should likewise be denied, since the state has presented only a skeleton of its Hurst argument in support of its instant petition. However, in the event that the state's petition in Hurst is relisted for the next conference, Johnson must respond in this brief in opposition to the arguments made by the state in Hurst in order to show why both petitions should be denied.

I. THE DECISION OF THE SUPREME COURT OF FLORIDA IS BASED ON STATE LAW; I.E. THE PROVISION OF THE THEN-APPLICABLE FLORIDA CAPITAL SENTENCING STATUTE REQUIRING AT LEAST THREE FINDINGS - - NOT JUST ONE FINDING OF A SINGLE AGGRAVATING FACTOR - - BEFORE A DEATH SENTENCE MAY BE IMPOSED

Simply put, this Court in Hurst v. Florida, 136 S.Ct. 616 (2016) considered the prerequisites for imposition of a death sentence as set forth in the Florida statute, and nine months later the Florida Supreme Court in Hurst v. State, 202 So.3d 40 (Fla. 2016) confirmed that this Court's understanding of Florida death penalty law was correct.

In Hurst v. Florida, 136 S.Ct. at 622 (emphasis in opinion), this Court rejected the state's contention that a jury's advisory death recommendation "necessarily included a finding of an aggravating circumstance", and that such a finding "qualified Hurst for the death penalty under Florida law, thus satisfying Ring":

> 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 a 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 [State v.] Steele, [921 So.2d 538, 546 (Fla. 2005)].

On direct appeal in the instant case, in its February 2016 supplemental answer brief addressing the impact of Hurst v. Florida, the state continued to argue its own interpretation of Florida sentencing law; i.e., that it need only prove the existence of a single aggravating factor, and that "[d]eath is presumptively the appropriate sentence" whenever a single aggravator is established. [Respondent's

appendix, p. 62a]. Importantly, the state told the Florida Supreme Court, "As sentencing enhancement is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative")." [Respondent's appendix, p. 62a]).

The state - - having tried repeatedly and failed repeatedly to persuade the Florida Supreme Court that Florida law requires only a finding of a single aggravating factor - - is now seeking to have this Court second-guess that state law determination. In Hurst v. State, 202 So.3d at 51 and 53, n.7 - - after recognizing that "[a] close review of Florida's sentencing statutes is necessary to identify those critical findings that underlie imposition of a death sentence, which is a matter of state law" - - the state Supreme Court explicitly rejected the state's argument, noting that "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. See §921.141(3), Fla. Stat. (2012)".[2]

Similarly, in Jackson v. State, __ So.3d __ (Fla. 2017) [2017 WL 1090546] - - another case in which the state had argued in its supplemental brief addressing the application of Hurst v. Florida[3] (1) that a death sentence in Florida is authorized (and presumptively appropriate) "upon the finding of the existence of one ag-

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[2] See also Powell v. Delaware, 153 A.3d 69 (Del. 2016) (emphasis supplied) (noting that "[w]hen Hurst was remanded, the Florida Supreme Court summarized its law" as requiring findings that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating factors).

[3] See Respondent's appendix, p. 80a.

gravating factor", and (2) that the prerequisites for a death sentence are a matter of state law so the Florida Supreme Court's determination controls[4] - - that Court agreed with the state that the prerequisites are a matter of state law, but disagreed with the state regarding what those prerequisites are. Specifically, the Court rejected the state's assertion that under Florida law a finding of a single aggravator sufficed:

> Ring and Hurst v. Florida simply state that the jury must find "any fact on which the legislature conditions an increase in the maximum punishment." Hurst v. Florida, 136 S.Ct. at 620; Ring, 536 U.S. at 588, 122 S.Ct. 2428. Those facts that permit the authorization of a death sentence are a matter of state law. See Hurst v. Florida, 136 S.Ct. at 619 ("Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. . . We hold this scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (emphasis added)); Ring, 536 U.S. at 588, 122 S.Ct. 2428 ("In Arizona . . . the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by law for imposition of the death penalty.").

2017 WL 1090546, p. 20 (emphasis in opinion)

The Florida Supreme Court then stated that "[o]ur review of these [Florida capital sentencing] statutes leads to the conclusion that the facts that were necessary to impose the death penalty in Florida at the time that Jackson was sentenced are those highlighted in section 921.141(3)(a)-(b): that sufficient aggravating circumstances exist and the existing aggravation outweighs the presented mitigation." 2017 WL 1090546, p. 21 (emphasis in opinion). Therefore, the court continued, "[t]hese are the facts that must be found by a jury under Hurst v. Florida." Id, at p. 21.

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[4] See Respondent's appendix, p. 90a.

A state's highest court is unquestionably "the ultimate expositо[r] of state law." Riley v. Kennedy, 553 U.S. 406, 425 (2008), quoting Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). As was correctly stated in McLaughlin v. Steele, 173 F.Supp.3d 855, 896 (E.D.Mo. 2016), "[u]nder Ring, where death-eligibility hinges on a finding of fact under state law, that fact must be decided by the jury. Under Missouri law, the weighing of mitigating and aggravating circumstances is a finding of fact. Therefore, that weighing should have been committed to the jury." The same is true of Florida law, as explained in Hurst v. State and Jackson.

II. FLORIDA IS, AND (AT LEAST SINCE FURMAN) ALWAYS HAS BEEN, A WEIGHING STATE, IN WHICH DEATH-ELIGIBILITY IS DETERMINED BY CONSIDERATION OF THE EXISTENCE AND WEIGHT OF MULTIPLE FACTORS

The state, in playing its "single aggravator" card, not only ignores the Florida Supreme Court's rejection of that argument as a matter of state law in Hurst v. State and Jackson, it also ignores the crucial distinction between weighing and nonweighing capital sentencing systems.

"States employ one of two methods to determine which defendants are eligible for the death penalty, weighing and nonweighing." Woldt v. People, 64 P.3d 256, 263 (Colo.2003). Florida, for more than forty years under the 1972 post-Furman[5] statute under which Paul Johnson, Timothy Hurst, and Kenneth Jackson were tried, was a textbook example of the former. See, e.g., Parker v. Dugger, 498 U.S. 308, 318 (1991) ("As noted, Florida is a weighing State; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating

[5] Furman v. Georgia, 408 U.S. 238 (1972).

circumstances"); see also Stringer v. Black, 503 U.S. 222, 231 (1992) ("Florida, like Mississippi, is a weighing state"); Hardwick v. Crosby, 320 F.3d 1127, 1165 (11th Cir.2003); Kearse v. State, 662 So.2d 677, 686 (Fla.1995).

As has been recognized, the term "nonweighing" is something of a misnomer because even in those states the trier of fact does weigh aggravators against mitigators. One critical difference is that in nonweighing systems there are essentially two sets of aggravating factors; there is a narrower list to establish death-eligibility, and after the jury has made such a finding it may then "consider aggravating factors different from, or in addition to, the eligibility factors." Wilson v. Mitchell, 498 F.3d 491, 505 (6th Cir. 2007); see Brown v. Sanders, 546 U.S. 212, 216-20 (2006). Only in nonweighing systems does the finding of one or more aggravating factors automatically make the defendant eligible for a death sentence (although he or she may or may not ultimately be selected for a death sentence), while in weighing states - - in contrast - - the trier of fact must weigh the aggravating factors against all of the mitigating factors to make a death-eligibility determination. See Woldt, 64 P.3d at 263-64. As explained in Jennings v. McDonough, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007) (a federal habeas decision in a Florida capital case), "[a] weighing state is one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors", while "[i]n a nonweighing state . . . eligibility and the actual sentence are determined separately."

Florida's credentials as a weighing state were established as early as 1972

when Florida Statutes, §921.141 was enacted, and 1973 when that statute was first construed by the Florida Supreme Court in State v. Dixon, 283 So.2d 1 (Fla.1973). There, the court recognized that "the Legislature has chosen to reserve [the death penalty's] application to only the most aggravated and least mitigated of most serious crimes." 283 So.2d at 7. (emphasis supplied). While under certain circumstances a single aggravator may be enough to make a homicide one of the "most aggravated", that outcome is relatively rare. As a general rule, the Florida Supreme Court does not uphold a death sentence supported by a single aggravator unless it is an especially egregious one under the facts of the case, or unless the mitigating evidence is insubstantial. See, e.g. Yacob v. State, 136 So.3d 539, 551 (Fla.2014); Nibert v. State, 574 So.2d 1059, 1063 (Fla.1990).

With this backdrop of Florida legislative intent to restrict application of the death penalty to only the most aggravated (and least mitigated) first degree murders, the Florida Supreme Court's rejection on state law grounds of the state's "single aggravator" argument comes into even clearer focus. If the state's argument had prevailed, nearly everyone convicted of a first degree murder would be death-eligible from jump street.

Florida's death penalty statutes (pre- and post-Hurst) set forth sixteen aggravating factors (ten of which were added after the 1972 statute was originally enacted). Anyone convicted of a first-degree murder committed in the course of a robbery, burglary, aggravated child abuse, arson, kidnapping, or sexual battery starts off with an aggravator. Anyone with a prior or contemporaneous conviction of a vio-

lent felony starts off with an aggravator. Most murders committed by means other than gunshot (and even gunshot murders if they are preceded by significant physical torment or prolonged anticipation of death) qualify for the EHAC aggravator[6]. Pre-planned murders (CCP)[7], financially motivated murders, murders committed to avoid arrest or prosecution, all result in at least one aggravator. Then there are the "defendant status" and "victim status" aggravators. The former (in addition to the "prior violent felony" aggravator) apply to any defendant who was under sentence of imprisonment, or on community control (for a felony), or on felony probation. [For the "under sentence" aggravator the prior felony need not have involved the use or threat of violence]. "Defendant status" aggravators also include criminal gang members and persons presently or previously designated as sexual predators. "Victim status" aggravators apply to any case where the victim of a first-degree murder was less than twelve years old, or was a law enforcement officer engaged in the performance of his or her official duties, or was particularly vulnerable due to advanced age or disability (or where the defendant was in a position of familial or custodial authority over the victim). And, even in the rare circumstances where none of those aggravators apply, there are still four more.[8]

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[6] Especially heinous, atrocious, or cruel.

[7] Cold, calculated, and premeditated.

[8] Defendant knowingly created a great risk of death to many persons; homicide committed to disrupt or hinder any governmental or law enforcement function; homicide of an elected or appointed public official engaged in the performance of his or her official duties (where crime was motivated in whole or in part by the victim's official capacity); and homicide committed by a person subject to a domestic violence

The state's contention in its petitions for certiorari in Hurst and (by piggy-back) in the instant case is that - - notwithstanding the Florida Supreme Court's state law holding that the Florida statutory scheme requires findings that the sum of the aggravators are sufficient to warrant a death sentence and that the aggravators outweigh the mitigators - - the Sixth Amendment requires only a jury finding of a single aggravator. The state's remarkably pinched interpretation of Hurst v. Florida would reduce the Sixth Amendment right to all form and no substance. It would mean that in any case where a defendant convicted of first degree murder had a prior conviction of a violent felony on his record, even a twenty year old strongarm robbery or a fifteen year old aggravated battery, there would be no constitutional problem if the jury packed up and went home after the guilt phase[9]. In any convenience store robbery which resulted in the fatal shooting of the clerk - - if the jury in the guilt phase found the defendant guilty of both felony-murder and the robbery - - there would be no Sixth Amendment requirement of any jury participation in the penalty phase. In any prison murder, in any case where the defendant was on felony community control or felony probation, in any case where the victim was a child under twelve or any on-duty police officer, the jury would be asked to make a pro forma finding of a single undisputed and indisputable fact, and the rest of the fact-finding could be consigned to the judge. The jury would not be constitutionally re-

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injunction or protection order (where the victim was the person who obtained the injunction or protection order, or a spouse, child, sibling, or parent of that person).

[9] See Almendarez-Torres v. United States, 523 U.S. 224 (1998); Jackson v. State, 2017 WL 1090546, p. 24.

quired to consider other aggravating circumstances, or any mitigating circumstances, or weigh the aggravators against the mitigators to determine whether death or life imprisonment was the appropriate sentence under the totality of the facts. Under the state's interpretation of what Florida law requires - - one which was flatly rejected by the state Supreme Court - - the Sixth Amendment guarantee that a death sentence must be based on jury factfinding would be reduced to an empty formality, or, as Florida's former Chief Justice once put it, a cruel joke. See Conde v. State, 860 So.2d 930, 959-60 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part) (noting also that "[t]he Ring opinion focused on substance, not form).

III. THE SPLIT OF AUTHORITY ASSERTED BY THE STATE IS ILLUSORY

According to the state, a plethora of decisions from jurisdictions other than Florida create "significant and deepening conflicts" [State's petition for writ of certiorari in Hurst, Respondent's appendix, p. 38a, see 34a-38a]. This so-called split of authority is overblown and illusory. As shown in Parts I and II, the Florida Supreme Court's decisions in the instant case, Hurst, and Jackson are based on state law; specifically the findings required for death-eligibility under the Florida capital sentencing scheme. Similarly, the decisions from Arizona, Colorado, Missouri, and Delaware[10] - - which the state asserts that Florida has "joined" [Respondent's ap-

[10] State v. Ring, 65 P.3d 915, 943 and 946 (Ariz. 2003); Woldt v. People, 64 P.3d 256, 266 (Colo. 2003); State v. Whitfield, 107 S.W. 3d 253, 258-61 (Mo. 2003); Rauf v. State, 145 A.3d 430, 462 and 485 (Del. 2016)(opinion of Chief Justice Strine, joined

pendix, p. 36a] - - are actually based on each state's highest court's analysis of the capital sentencing law of that state. Conversely, Alabama, Ohio, and Nebraska[11] - - which the state portrays as lining up on the opposite side of a split - - have very dissimilar capital sentencing schemes. Different state courts interpreting different state laws differently does not create a federal constitutional conflict. If, in a state other than Florida, a finding of a single aggravating factor is enough to make a defendant death-eligible, it is no conflict for the Supreme Court of Florida (or the Supreme Court of Arizona or Delaware) to hold that in our state, under our statute and our legislative history, that single finding is not enough. And that is what Florida's highest court held in Hurst v. State and Jackson.

The Arizona Supreme Court's decision on remand in Ring illustrates this point. As the state itself asserted on direct appeal in the instant Florida case, sentencing enhancement is a matter of state law and the state Supreme Court's determination controls; the state cited "Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative"). "[Respondent's appendix, p. 64a, see also p. 92a]. What the state of Arizona argued on remand in Ring - - just as the state of Florida argued in the instant case, Hurst v. State, Jackson, and numerous others - - is that the only finding necessary to establish death-eligibility is a finding

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by Justices Holland and Seitz, and opinion of Justice Holland, joined by Chief Justice Strine and Justice Seitz.

[11] Ex Parte Bohannon, __ So.3d __ (Ala. 2016) [2016 WL 5817692]; State v. Belton, __ N.E.3d __ (Ohio 2016); State v. Gales, 694 N.W. 2d 124 (Neb. 2005).

of a single aggravator. The Arizona Supreme Court in 2003, just like the Florida Supreme Court in 2016, rejected that contention as a matter of state law:

> Another factor leads us to conclude that we should not adopt the State's argument. As is evident, the procedures urged by the State do not reflect any sentencing procedure ever adopted by our legislature. In both the superseded and current capital sentencing schemes, the legislature assigned to the same factfinder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13-703.E (Supp.2002) and 13-703.F (Supp. 2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process.

State v. Ring, 65 P.3d 915, 943 (Ariz. 2003).

Further emphasizing its rejection of the state's "single aggravator" argument, the court wrote "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." State v. Ring, 65 P.3d at 946. Quoting A.R.S. §13-703.E, the court recognized that under Arizona's statutory scheme the trier of fact must also find "that there are no mitigating circumstances sufficiently substantial to call for leniency" before a death sentence may be imposed.

The Arizona Supreme Court's construction of Arizona law in State v. Ring, parallels the Florida Supreme Court's construction of Florida law in Hurst v. State:

> These necessary facts [for imposition of the death penalty in Florida] include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to

> require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Id. at 313, 111 S.Ct. 731 (emphasis added) (quoting §921.141(3), Fla.Stat. (1985)). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. These same requirements existed in Florida law when Hurst was sentenced in 2012 –although they were consigned to the trial judge to make.

202 So.3d at 53 (emphasis in opinion).

As if that weren't explicit enough, the Florida Supreme Court stated in footnote 7:

> Accordingly, we reject the State's argument that Hurst v. Florida only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in Hurst v. Florida made clear that the jury must find "each fact necessary to impose a sentence of death, " 136 S.Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," id. at 621, "the facts necessary to sentence a defendant to death," id. "the facts behind" the punishment, id. and "the critical findings necessary to impose the death penalty" id. at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended for imposed. See §921.141(3), Fla.Stat. (2012).

202 So.3d at 53, n.7 (emphasis in opinion).

Similarly, the decisions of the Colorado Supreme Court in Woldt v. People, 64 P.3d 256, 266 (Colo. 2003); the Missouri Supreme Court in State v. Whitfield, 107 S.W. 3d 253, 258-61 (Mo. 2003), and the Delaware Supreme Court in Rauf v. State, 145 A.3d 430 (Del. 2016) are based on the findings which are required by the capital sentencing laws of that particular state before a death sentence may be imposed.

For example, in Rauf one of the questions which had been certified by a lower court to the Delaware Supreme Court was this:

> Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because under 11 Del. C. § 4209, this is the critical finding upon which the sentencing judge "shall impose a sentence of death"?

145 A.3d at 433-34, 462, 485 (emphasis supplied).

By a three-two vote, the Delaware Supreme Court answered yes to this question. Chief Justice Strine, joined by Justices Holland and Seitz, wrote:

> I focus here on the question of who - jury or judge - may make the determination whether a defendant should receive a death sentence or not because I believe it is inarguable that the required determination in all contexts where the sentencing authority can give a defendant death or life involves factual determinations. That is clearly so under our own statute, which plainly requires that a specific finding be made before a death sentence can be issued. That finding is whether "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist."

Rauf v. State, 145 A.3d at 464 (emphasis supplied, footnotes omitted).

Justice Holland, joined by Chief Justice Strine and Justice Seitz, wrote:

> The answer to question three is yes. This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors...."

Rauf v. State, 145 A.3d at 485 (emphasis supplied, footnotes omitted).

It is worth noting that, while all of the capital sentencing laws in the various jurisdictions cited by the state to establish its illusory "conflict" differ from one another, Delaware's and Florida's are the most similar since the Delaware legislature modeled its statute after Florida's. See State v. Cohen, 604 A.2d 846, 849 (Del.

1992), overruled by Rauf v. State, supra. The Delaware Supreme Court had specifically noted in Cohen, at 851, n.4, that Delaware's then-new law was "patterned after the Florida statute", and "Before a death sentence could be imposed, the Florida statute required that there be 'insufficient mitigating circumstances to outweigh the aggravating circumstances'. Fla. Stat. Ann. §921.141" (emphasis in Cohen opinion).

The capital sentencing schemes at issue in Ex Parte Bohannon, __ So.3d __ (Ala. 2016) [2016 WL 5817692]; State v. Belton, __ N.E.3d __ (Ohio 2016) [2016 WL 1592786]; and State v. Gales, 694 N.W. 2d 124 (Neb. 2015) are all significantly different from Florida's. Belton, for example, was a case in which the defendant waived his right under state law to a jury penalty verdict:

> Under [Ohio's] statutory scheme, then, when a capital defendant waives a jury and enters a no-contest plea, a three-judge panel determines both guilt and the appropriate sentence. "R.C. 2945.06 and Crim.R. 11(C) (3) contain no provisions permitting an accused charged with a capital offense to waive a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty." Bates, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, at ¶ 29, citing State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 122-125. And trial courts are not at liberty to create a nonstatutory procedure to convene a jury for sentencing purposes. See State ex rel. Mason v. Griffin, 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644, ¶ 17 (granting a writ to prohibit a trial judge from creating a hybrid, nonstatutory procedure).
>
> In short, Ohio law does not permit a jury to sentence a capital defendant if the defendant has elected to enter a plea of guilty or no contest to capital charges.

2016 WL 1592786, p. 8.

[In Florida, in contrast, a guilty or no contest plea in a capital trial does not operate as a waiver of a jury for the penalty phase; rather, the defendant must specifically (and knowingly and voluntarily) waive his right to a penalty jury. See, e.g.,

State v. Hernandez, 645 So.2d 432, 434-35 (Fla. 1994). And unless he does so, there is no impediment in Florida to convening a jury solely for sentencing purposes. See, e.g., Zakrzewski v. State, 717 So.2d 488, 490 (Fla. 1998)].

The Ohio Supreme Court expressly recognized in Belton that "Ohio's capital sentencing scheme is unlike the laws at issue in Ring and Hurst." 2016 WL 1592786, p. 9:

> In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); State v. Thompson, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

2016 WL 1592786, p. 9 (emphasis supplied).

In Ohio, during the guilt phase of a capital trial, the state must prove the defendant guilty of the crime of aggravated murder, and must also prove the defendant guilty of at least one statutorily defined aggravating circumstance. Only then does the case proceed to a bifurcated penalty phase, in which the state may present additional evidence relevant to the aggravating circumstance[s], and the defense may present evidence in mitigation. Then, "[i]f the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender shall be sentenced

to one of the following . . ." (life imprisonment without parole, or life imprisonment with parole eligibility after 25 or 30 years). [Ohio Revised Code, section 2929.03(D)(2). See State v. Gumm, 653 N.E. 2d 253,260 (Ohio 1995); State v. Wogenstahl, 662 N.E.2d 311,319 (Ohio 1996); Ohio Revised Code, sections 2929.03 and 2929.04. An Ohio jury's life recommendation is binding, but a death recommendation is not.

Thus Ohio - - unlike Florida - - is a jurisdiction in which under state law a finding of a single aggravator does make a defendant death-eligible. Even so, Ohio has chosen to require a unanimous jury finding that the aggravating factors outweigh the mitigating factors before the defendant may be sentenced to death, unless the defendant - - as in Belton - - has waived that right.

Nebraska - - a state in which the death penalty was recently repealed by its unicameral legislature and then reinstated by popular vote, and which has executed only three defendants since Furman and none in the last two decades - - employs a unique capital sentencing scheme which in no way resembles Florida's. Unlike Florida - - a weighing state where the trier of fact determines death-eligibility and selection in a single step based on evaluation of the same sentencing factors[12] - - Nebraska law provides for an "aggravation hearing" following a determination of guilt in a first degree murder case, in which the jury determines whether the aggravating factors alleged by the state exist, unless the defendant waives a jury determination. If no aggravating factor is found to exist, the judge must impose a sen-

[12] See Jennings v. McDonough, supra, 490 F.3d at 1249, n.14.

tence of life imprisonment. If one or more aggravating factors are found, a panel of three judges is convened to hear the evidence in mitigation as well as evidence of sentence excessiveness or disproportionality. The three-judge panel then considers whether the aggravating circumstances justify imposition of a death sentence, whether the mitigating circumstances "approach or exceed" the weight given to the aggravators, and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. See Neb.Rev. Stat. §§29-2519, 29-2520, 29-2521, 29-2522, 29-2523; State v. Gales, 658 N.W.2d 604, 625-27 (Neb. 2003) [Gales I]; State v. Gales, 694 N.W.2d 124, 145 (Neb. 2005) [Gales II]. Under Nebraska law as construed by the Nebraska Supreme court in Gales I and Gales II, the eligibility and selection determinations are separate, and a finding of one aggravator makes a defendant death-eligible. 658 N.W. 2d at 626-27; 694 N.W. 2d at 145. Single-aggravator eligibility is precisely how the state urged the Florida Supreme Court to construe Florida's capital sentencing statute in the instant case and Hurst v. State and Jackson, and the Florida Supreme Court unequivocally rejected the state's position as a matter of state law. Whether Nebraska's system can withstand constitutional scrutiny after Hurst v. Florida is open to question, but that question should be decided, if at all, in a Nebraska case. The fact that Florida and Nebraska have vastly different capital sentencing requirements and procedures does not create a federal constitutional conflict.

Alabama's system - - the only one in the nation which permits a trial judge to impose a death sentence notwithstanding a contrary jury verdict - - is likewise of

dubious constitutional validity. See Woodward v. Alabama, 134 S.Ct. 405, 405-12 (2013) (Sotomayor, J., joined by Breyer, J., dissenting from denial of certiorari). If the Supreme Court of Alabama interprets its death penalty statute as requiring only one aggravating circumstance in order to impose death [see Ex parte Waldrop, 859 So.2d 1181, 1188 (Ala. 2002); Ex parte Bohannon, __ So.3d __ (Ala. 2016) [2016 WL 5817692], p. 3 ("Only one aggravating circumstance must exist in order to impose a sentence of death. Ala.Code 1975, §13A-5-45(f)")], that doesn't mean that the Supreme Court of Florida must follow suit.

The remainder of the case law relied on by the state does not even involve the question of what findings are necessary in a given jurisdiction to permit imposition of a death sentence. Instead, the issue in each of those decisions is the applicable standard of proof. The state cites United States v. Gabrion, 719 F.3d 511, 532-33 (6th Cir. 2013) (en banc) and four other pre-Hurst decisions[13] construing the federal death penalty scheme (FDPA). [See Respondent's appendix, p. 36a-37a]. However, the federal scheme (a classic nonweighing system) is completely different from the 1972 Florida scheme (a classic weighing system) under which Paul Johnson and Timothy Hurst were tried. Under the FDPA, in order to establish death-eligibility, the jury must first find that the defendant acted intentionally in killing another person [a requirement which does not exist in Florida, since under both the 1972

[13] United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Barrett, 496 F.3d 1079, 1107-08 (10th Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5the Cir. 2007); United States v. Sampson, 486 F.3d 13, 31-32 (1st Cir. 2007).

and 2016 statutes the death penalty may be imposed for unpremeditated felony murders], and must find the existence of at least one statutory aggravating factor. Once those findings are made, the jury proceeds to the selection phase, during which it may consider nonstatutory aggravating factors as well as statutory ones. [18 U.S.C. § 3592 (c)][another hallmark of a nonweighing system which has always been impermissible in Florida]. Each juror then weighs aggravating factors (found unanimously beyond a reasonable doubt) against mitigating factors (found by that juror by a preponderance of the evidence), and if the jury unanimously concludes that the aggravators outweigh the mitigators[14] it may recommend the death penalty. See Jones v. United States, 527 U.S. 373, 376-77 (1999) (cited in Gabrion, 719 F.3d at 531-32); United States v. Umana, 707 F.Supp.2d 621, 629 (W.D.N.C.2010); 18 United States Code §3591, 3592, and 3593.

The state's reliance on Kansas v. Carr, 136 S.Ct. 633 (2016) [see Respondent's appendix, p. 31a] is also misplaced. The Kansas statute under consideration in Carr provided for jury findings and jury weighing of the aggravating and mitigating factors. See State v. Kleypas, 40 P.3d 139, 253 (Kan. 2001). See also Kansas v. Marsh, 548 U.S. 163, 166 (2006) ("The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M.P."). Moreover, Carr does not even involve a Sixth Amendment issue; the question there was whether the

[14] Or, in the absence of any mitigating factors, if it unanimously concludes that the aggravating factor[s] alone are sufficient to justify a death sentence.

Eighth Amendment required a jury instruction that mitigating circumstances need not be proved beyond a reasonable doubt. In State v. Gleason, 329 P.3d 1102, 1147 (Kan. 2014) - - one of the two decisions reversed by this Court in Carr on the instructional issue - - "the jury found the existence of all four aggravating circumstances alleged by the state beyond a reasonable doubt, determined the aggravating circumstances were not outweighed by any mitigating circumstances, and unanimously agreed to sentence Gleason to death."

Similarly, New Mexico, Maryland (before it abolished its death penalty), Nevada, Pennsylvania, and Indiana [see Respondent's appendix, p. 37a] all require the jury, in order to recommend a death sentence, to determine unanimously that the aggravating factors outweigh the mitigating factors (or, conversely, that the mitigators do not outweigh the aggravators).[15] The cases cited by the state - - State v. Fry,

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[15] NMRA, Crim. UJI 14-7030; State v. Fry 126 P.3d 516, 531 (N.M. 2005); Oken v. State, 835 A.2d 1105, 1117-18 (Md.2003); Baker v. State, 861 A.2d 48, 54 n.8 (Md.2004); Baker v. State, 790 A.2d 629, 640-41 (Md.2002); Jimenez v. State, 918 P.2d 687, 696 (Nev.1996); Evans v. State, 28 P.3d 609, 635-36 (Nev.2001); Maestas v. State, 275 P.3d 74, 82 (Nev.2012); 42 Pa. C.S. §9711(c)(1)(iv); Commonwealth v. Rivera, 108 A.3d 779, 807 (Pa. 2014); Commonwealth v. Watkins, 108 A.3d 692, 732 and n.18 (Pa. 2014); Indiana code 35-50-2-9; Woods v. State, 863 N.W.2d 301, 302 (Ind. 2007). In New Mexico, Pennsylvania, and Maryland (before abolition), failure to obtain a unanimous jury finding that the aggravators outweigh the mitigators precludes imposition of a death sentence. See NMRA, Crim. UJI 14-7030; Fry, 126 P.3d at 531; Rivera, 108 A.3d at 807; Oken, 835 A.2d at 1117-18. In Nevada, when the jury is unable to reach a unanimous decision, the trial judge has discretion to choose between imposing a life without parole sentence or impaneling a new penalty jury. NRS 175.556(1); Maestas, 275 P.3d at 82. In Indiana, if the jury is unable to reach a unanimous penalty recommendation "after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone." Indiana Code 35-50-2-9. [Indiana's rarely employed provision is likely unconstitutional under Ring and Hurst, but that should be determined in an Indiana case].

126 P.3d 516, 534 (N.M. 2005); Oken v. State, 835 A.2d 1105, 1158 (Md. 2003); Nunnery v. State, 263 P.3d 235, 252 (Nev. 2011); Commonwealth v. Roney, 866 A.2d 351, 360 (Pa. 2005); and Ritchie v. State, 809 N.E.2d 258, 266 (Ind. 2004) - - all deal with jury instructions on the standard of proof. On the issue which the Florida Supreme Court resolved as a matter of state law in Hurst v. State and Jackson v. State - - i.e., what are the critical findings which must be made to sentence a Florida defendant to death - - there is no conflict.

IV. FACTFINDING IS AN INHERENT COMPONENT OF THE WEIGHING PROCESS IN FLORIDA

In Hurst v. State, 202 So.2d at 53, the Florida Supreme Court held that the "necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding . . ."; i.e., that the aggravating factors are sufficient to impose death and that they outweigh the mitigating factors. See also Jackson v. State, 2017 WL 1090546, p. 21.

The state, in its petition for certiorari in Hurst, asserts repeatedly that weighing is separate from factfinding. [See Respondent's appendix, p. 30-31, 33, 35-37]. The state even frames its loaded Question Presented with the ipse dixit assertion that the determination of whether the aggravating circumstances are sufficient and whether they outweigh the mitigating circumstances are "statutorily mandated non-factual findings" [Respondent's appendix, p.2]. However, the Florida Supreme Court's conclusion, based on this state's death penalty statute, that these are fact-

finding determinations is consistent with longstanding Florida law and practice, as well as the legislative intent that the death penalty be reserved for only the most aggravated and least mitigated of first-degree murders.

Factfinding in Florida is part and parcel of the weighing process, and the latter cannot be done without the former. For one obvious example, two of the most compelling Florida mitigators are those relating to the defendant's mental condition at the time of the crime; "extreme mental or emotional disturbance" and "impaired capacity." Whether these mental mitigators are found or not found is always important - - and often outcome-determinative - - as to whether a death sentence is imposed or upheld. See, e.g. Delgado v. State, 162 So.3d 971 (Fla.2015); Santos v. State, 629 So.2d 838 (Fla.1994). Typically, the question of whether these mitigators have been established gives rise to a "battle of experts". Dr. Jekyll may testify for the defense that the defendant was paranoid and delusional, that he was exhibiting bizarre thoughts and behavior, and that (in the doctor's professional opinion) he was under extreme mental or emotional disturbance and his ability to control his impulses was severely impaired. Dr. Zhivago may testify for the state that the defendant is a manipulative, sociopathic malingerer, that the crime was committed in a methodical manner inconsistent with impairment of mental or emotional faculties, and that (in the doctor's professional opinion) neither "mental mitigator" existed.

What happens then? Under the unconstitutional system where the jury made no findings and returned only an advisory recommendation by majority vote,

and the judge then made the written findings, weighed them, and imposed the sentence, here's what often happened. The judge would determine the credibility of the conflicting experts (as well as the credibility of any lay witnesses concerning the defendant's life history and behavior), and if he found the state's expert[s] more credible than the defendant's expert[s], he would so state in his written findings. If he then found that the mental mitigators were not established and accorded them no weight in the weighing process (or if he found, based on his credibility assessment, that they were entitled to little weight), the judge's finding would be upheld on appeal as a proper exercise of his discretion. See, e.g. Hobart v. State, 175 So.3d 191, 202 (Fla.2015); Kocaker v. State, 119 So.3d 1214, 1229-31 (Fla.2013); Ault v. State, 53 So.2d 175, 188 (Fla.2010); Patton v. State, 878 So.2d 368, 391 (Fla.2004); Lynch v. State, 841 So.2d 362, 374 (Fla.2003); Zack v. State, 753 So.2d 9, 19 (Fla.2000); Knight v. State, 746 So.2d 423, 436 (Fla.1998).

As the Florida Supreme Court has observed (in the context of a life override) "[a]lthough a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may." Stevens v. State, 552 So.2d 1082, 1086 (Fla.1989); see also Holsworth v. State, 522 So.2d 348, 354 (Fla.1988). As Justice Kogan, concurring in part and dissenting in part in the pre-Ring, pre-Hurst, case of Thompson v. State, 553 So.2d 153, 158-59 (Fla.1989) (in which the majority affirmed a death sentence imposed via a life override), pointed out:

> The flaw in [the majority's] reasoning is the mistaken premise that it is the judge's role to assess credibility. Although the judge issues "findings of fact" when he or she imposes the death penalty, the jury is still the primary finder of fact. Thus, it is beyond question that it is

> within the province of the jury to assess the credibility of witnesses and determine from that point whether the death penalty is appropriate. If the jury believes the evidence of Thompson's impaired capacity, then the trial court, as well as this Court, is bound by that finding. The fact that the trial judge does not believe the witness is utterly irrelevant.

The determination, often on conflicting evidence, of whether mitigating factors exist is obviously factfinding. Whether a defendant has a low IQ or a learning disability, whether (or to what extent) he was intoxicated at the time of the crime, whether he was physically, mentally, or sexually abused as a child, whether he was under the domination of a stronger or smarter co-perpetrator - - all questions of fact. If - - in a given state - - death-eligibility does not depend on a finding that the aggravators outweigh the mitigators, then (arguably) the Sixth Amendment might not require that finding to be made by a jury. But Florida's highest court has made it abundantly clear that in Florida death-eligibility does depend on a finding that the aggravators outweigh the mitigators, and the mere finding of a single aggravator is not sufficient.

As recognized in McLaughlin v. Steele, 173 F.Supp.3d 855, 896 (E.D.Mo. 2016) (emphasis supplied):

> Under Ring, where death-eligibility hinges on a finding of fact under state law, that fact must be decided by the jury. Under Missouri law, the weighing of mitigating and aggravating circumstances is a finding of fact. Therefore, that weighing should have been committed to the jury.

The same is true in Florida. See also Rauf v. State, 145 A.3d at 468, in which Delaware's Chief Justice Strine (joined by Justices Holland and Seitz) observed:

> . . . [O]ne need look no further than the aggravating and mitigating factors that the U.S. Supreme Court approved for use in making capi-

> tal sentencing determinations to see the factual nature of questions involved and how they came to bear on the issue of what punishment the defendant should suffer. As to aggravating factors, for example, the sentencing authority may consider "whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel." As to mitigating factors, approved considerations include "whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed." The core of each of these questions is a factual inquiry that a cross-section of the community is best suited to make. And on an even more basic level that extends beyond the capital sentencing context, appellate courts give enormous deference to a judge's or jury's sentencing determination precisely because of the factual nature of the issues involved in sentencing generally and the inescapable requirement for the sentencing authority to apply its discretionary sense of conscience and mercy to the case at hand.

(emphasis supplied, footnotes omitted)

As in Delaware, under Florida's capital sentencing law factfinding and weighing are inextricably intertwined; not separate as the state would have it. As noted earlier, the state in its Question Presented mischaracterizes the state-law required findings as "statutorily mandated non-factual findings supporting the imposition of the death penalty, such as the determination that aggravating circumstances outweigh mitigating factors and the related moral judgment that the defendant should be sentenced to death." [Respondent's appendix, p.2, emphasis supplied]. Because in Florida this "complex moral judgment"[16] is inseparable from the factual findings on which the outcome of the weighing process depends, the state's contention is fa-

[16] See Respondent's appendix, p. 37.

tally flawed. Moreover, to the extent that the death penalty weighing process involves a "moral judgment" because jurors "draw upon their sense of community norms in light of the totality of circumstances surrounding the criminal and the crime" [Nunnery v. State, 263 P.3d at 252-53, quoting Higgs v. United States, 711 F.Supp.2d 479, 540 (D.C. Md. 2010)], it has long been recognized that "a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). "And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system – a link without [which] the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon, 391 U.S. at 519, n.15, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). As stated in United States v. McVeigh, 944 F.Supp. 1478, 1487 (D.Colo. 1996) (emphasis supplied) to be constitutionally valid a capital sentencing procedure:

> . . . must guide the jurors to individualized consideration of each defendant. The aggravating factors considered must be objectively provable and rationally related to the criminal conduct in the offenses proven at trial. There can be no limitation on the ability of individual jurors to consider mitigating factors. The jurors must be unanimous if their finding is that death is justified, and the jury must articulate the reasons in a manner enabling meaningful appellate review. What must be clear in the end is that the jury has performed its task of acting as the conscience of the community in making a moral judgment about the worth of a specific life balanced against the societal value of a deserved punishment for a particular crime.

V. THE FLORIDA SUPREME COURT'S DETERMINATION IN HURST V. STATE THAT THAT THE JURY'S FINDINGS MUST BE UNANIMOUS IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

The state frames its second loaded Question Presented as "Whether the Eighth Amendment requires jury sentencing in capital case", and it mischaracterizes the Florida Supreme Court's holding in Hurst .v State.[17] [See Respondent's appendix, p.2, 38]. Contrary to the state's assertion, the Florida Supreme Court never held nor even suggested that "jury sentencing" is constitutionally required, nor did it adopt - - even as a matter of state law - - a "jury sentencing" procedure. The Florida Supreme Court's express holding in Hurst was simply that "before the trial judge may consider imposing a sentence of death" the jury under state law must make three required findings (one or more aggravators, aggravators are sufficient, aggravators outweigh mitigators) and not just one (existence of a single aggravator) as the state maintained. 202 So.3d at 57. Moreover, as the state Supreme Court added, "Nor do we intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life." 202 So.3d at 58. See also Rauf v. State, 145 A.3d at 479 (opinion of Chief Justice Strine) (trial judge retains discretion to review and potentially reject a jury's death recommendation).

Similarly, in the separate Eighth Amendment section of its Hurst opinion [Part III, 202 So.3d at 59-63], which follows its discussion of the jury unanimity requirements guaranteed by the Florida Constitution [Part II, 202 So.3d 54-56], the Florida Supreme Court did not hold or suggest that "jury sentencing" is required; it simply

[17] The opinion of the Florida Supreme Court in Paul Johnson's instant appeal does not even mention the Eighth Amendment.

concluded that the jury's findings must be unanimous. That conclusion is plainly based on independent, adequate, and well-documented state law grounds:

> . . . [W]e hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'" Ford v. State, 802 So.2d 1121, 1134 (Fla. 2001) (quoting Campbell v. State, 571 So.2d 415, 420 (Fla. 1990), receded from on other grounds by Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000)). As we explain, we also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

Hurst v. State, 202 So.3d at 54 (emphasis in opinion (first three) and supplied (last two).

After commenting on the roots in English jurisprudence of the right to a unanimous jury, the Court's discussion returned to Florida legal history and the development of its constitutional protections:

> In the Florida Constitution of 1838, article I, section 10, of the Declaration of Rights enshrined in Florida law the right to trial by jury in criminal cases. Article I, section 6, further guaranteed that the "right of trial by jury shall forever remain inviolate." Art. I, §6, Fla. Const. (1838). That right now resides in article I, section 22, of the Florida Constitution, which continues to provide that "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, §22, Fla. Const.
>
> The principle that, under the common law, jury verdicts shall be unanimous was recognized by this Court very early in Florida's history in Motion to Call circuit Judge to Bench, 8 Fla. 459, 482 (1859). In the 1885 constitution, the right to trial by jury was given even more protection by the promise that "[t]he right of trial by jury shall be secured to all, and remain inviolate forever." Declaration of Rights, §3, Fla. Const. (1885).

> And, in 1894, this Court again recognized that in a criminal prosecution, the jury must return a unanimous verdict. Grant v. State, 33 Fla. 291, 14 So. 757, 758 (1894). In 1911, this Court confirmed the unanimity requirement in Ayers v. State, 62 Fla. 14, 57 So.349, 350 (1911), stating that "[o]f course, a verdict must be concurred in by the unanimous vote of the entire jury." Almost half a century later, in Jones v. State, 92 So.2d 261 (Fla. 1956), again acknowledging that "[i]n this state, the verdict of the jury must be unanimous," this Court held that any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution. Id. At 261 (On Rehearing Granted). Thus, Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

Hurst v. State, 202 So.3d at 55 (emphasis supplied, footnotes omitted).

The Florida Supreme Court pointed out in footnote 10 that the state constitutional right to a unanimous verdict is incorporated in Florida Rule of Criminal Procedure 3.440 and the Florida Standard Jury Instructions for Criminal Cases. 202 So.3d at 55, n.10.

To the extent that the Hurst v. State opinion discusses the Eighth Amendment, it is as an alternative basis for a unanimity requirement. The state constitutional analysis is in no way intertwined - - either spatially or conceptually - - with the Eighth Amendment discussion. See Florida v. Powell, 559 U.S. 50, 56 (2010), quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision . . . rests on a state law ground that is independent of the federal question and adequate to support the judgment"). It is fundamental that state courts be left free in interpreting their own state constitutions. Powell, 559 U.S. at 56. In Hurst v. State, the independence of the state law ground for the jury unanimity requirement is abundantly clear from the face of the opinion, and the Florida Supreme Court's analysis of the Florida Constitution and this state's his-

torical precedents is anything but "obscure" or "ambiguous." See Powell, 559, U.S. at 56. The state constitutional analysis and the Eighth Amendment discussion are not "interwoven." Id, at 56-57. There is no jurisdiction and no reason for this Court to review the Florida Supreme Court's decisions in the instant case or in Hurst v. State as they are based on Florida capital sentencing law and Florida law guaranteeing jury unanimity.

CONCLUSION

The state's petitions for certiorari in the instant case and in Hurst v. State (no. 16-998) should be denied.

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