Filing # 199053591 E-Filed 05/23/2024 01:06:53 PM

IN THE SUPREME COURT OF FLORIDA

Case No. 2023-1298
LT Case No. 16-2005-CF-10263-CXXX-MA

MICHAEL JAMES JACKSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

MOTION FOR LEAVE TO FILE
***AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT**

Pursuant to Florida Rule of Appellate Procedure 9.370, the Florida Association of Criminal Defense Lawyers ("FACDL"), the Florida Public Defender Association ("FPDA"), National Association of Criminal Defense Lawyers ("NACDL"), Advancing Real Change, Inc. ("ARC"), Conservatives Concerned About the Death Penalty ("CCADP"), Craig Trocino, Esq., Death Penalty Focus ("DPF"), Floridians for Alternatives to the Death Penalty ("FADP"), Florida Justice Institute ("FJI"), Ripley Whisenhunt, PLLC, Witness to Innocence, and the 8th Amendment Project (collectively, "*Amici*"), hereby move for leave of Court to file the *Amici Curiae* Brief attached

hereto as Exhibit A in support of Appellant, Michael James Jackson, and state:

1. Both the U.S. and Florida Constitutions provide fundamental protections to capital defendants that must be upheld throughout the capital sentencing process. This case asks the Court to resolve the issue of whether applying Florida's 2023 capital sentencing scheme (§ 921.141, Fla. Stat. (2023) (the "8-4 Statute")) to resentencing proceedings granted after *Hurst v. Florida*, 577 U.S. 92 (2016), like Mr. Jackson's, is constitutional under the U.S. and Florida Constitutions. This is an issue of first impression that affects over 40 prisoners on Florida's death row from approximately 15 of Florida's Judicial Circuits.

2. *Amici* have an interest in this Court resolving the issue above because they each are somehow involved in or related to Florida's capital punishment system. Specifically, *Amici* are the following:

a. FACDL is a statewide non-profit organization with 32 chapters and more than 1,400 members, all of whom are

criminal defense practitioners. FACDL members represent capital defendants across the State.

b. FPDA is a nonprofit corporation whose members include 19 elected Public Defenders and nearly 2,000 employees of public defender offices throughout Florida. FPDA assists the elected Public Defenders in fulfilling their constitutional duty to ensure equal justice for all.

c. The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

d. ARC is a non-profit organization with offices in Jacksonville, Florida, and Baltimore, Maryland, that provides mitigation investigations in capital and non-capital cases in

Florida and throughout the United States. In addition to direct casework, the organization trains and educates approximately 2,000 criminal defense practitioners annually regarding the effective collection and presentation of mitigating evidence.

e. CCADP, a project of Equal Justice USA, is a network of political and social conservatives who question the alignment of capital punishment with conservative principles and values.

f. Craig Trocino, Esq. is Associate Professor of Clinical Legal Education and the director of the University of Miami School of Law's Innocence Clinic. The Innocence Clinic is a member of the Innocence Network and is dedicated to identifying and exonerating the wrongfully convicted in Florida.

g. DPF is a not-for-profit organization based in California that brings together a broad coalition of groups and individuals—including not only death row inmates and their families, but also law enforcement, corrections personnel, former prosecutors and judges, victims of crime and their families, clergy and faith leaders, community leaders, elected

officials, and exonerees—to promote fairness and justice in criminal prosecutions and sentencing.

h. FJI is a nonprofit public interest law firm that uses impact litigation to improve the lives of Florida's poor and disenfranchised residence, while focusing on criminal justice reform, homelessness and poverty, disability access, and other civil rights issues.

i. FADP is a statewide non-profit organization working to end the death penalty in Florida, including through education.

j. Ripley Whisenhunt, PLLC is a law firm specializing in capital defense and complex litigation. The firm is committed to ensuring that all people are treated with dignity and respect.

k. Witness to Innocence is a non-profit organization led by death row exonerees whose mission is to empower exonerated death row survivors to be the most powerful and effective voice in the fight to end the death penalty and reform the U.S. justice system.

l. The 8th Amendment Project brings together dozens of national, state, and local partners around a shared strategy to achieve repeal and discourage use of the death penalty by working to change the public discourse about capital punishment in the United States.

3. *Amici* can assist this Court in addressing the issue stated above by providing the Court with data related to the *Hurst* resentencing proceedings that have occurred across the State. As the *Amici Curiae* Brief explains, the data illustrate the constitutional violations involved when the 8-4 Statute is applied to *Hurst* resentencing proceedings like Mr. Jackson's.

4. Counsel for Appellant consents to *Amici* participating in this case. Counsel for Appellee, Michael Mervine, Esq., does not consent.

WHEREFORE, *Amici* respectfully request that this Court grant them leave to file the *Amici Curiae* Brief attached hereto as Exhibit A in support of Appellant in this cause.

Respectfully submitted,

QUARLES & BRADY LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this May 23, 2024, I electronically filed the foregoing with the Clerk of the Court using Florida State Court's e-filing system. I also certify that the foregoing document was served this day on counsel of record via transmission of Notices of Electronic Filing generated by the e-filing system.

/s/ *Melanie C. Kalmanson*
Melanie C. Kalmanson, Esq.

IN THE SUPREME COURT OF FLORIDA

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EXHIBIT A

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MICHAEL JAMES JACKSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

BRIEF OF *AMICI CURIAE* FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE FLORIDA PUBLIC DEFENDER ASSOCIATION, ADVANCING REAL CHANGE, INC., CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY, CRAIG TROCINO, ESQ., DEATH PENALTY FOCUS, FLORIDA JUSTICE INSTITUTE, FLORIDIANS FOR ALTERNATIVES TO THE DEATH PENALTY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RIPLEY WHISENHUNT, PLLC, WITNESS TO INNOCENCE, AND THE 8TH AMENDMENT PROJECT

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STATEMENT OF IDENTITY AND INTEREST

Amici submit this Brief in support of Appellant, Michael James Jackson.[1] *Amici*'s purpose in submitting this Brief is to present the Court with data related to the prisoners who were entitled to resentencing after *Hurst v. Florida*, 577 U.S. 92 (2016) ("*Hurst I*").[2] In particular, the data illustrate that applying Florida's 2023 capital sentencing statute to cases like Mr. Jackson's produces arbitrary results that violate the U.S. and Florida Constitutions.

The Florida Association of Criminal Defense Lawyers is a statewide non-profit organization with 32 chapters and more than 1,400 members, all of whom are criminal defense practitioners.

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[1] The Record on Appeal is cited as "R." The Initial Brief of Appellant is cited as "Jackson Br."

While this Brief focuses on the constitutional arguments related to applying section 921.141, Florida Statutes (2023), to cases like Mr. Jackson's, it is not meant to dismiss or undermine any of the other arguments presented in Mr. Jackson's Brief, including especially the argument based on section 775.022, Florida Statutes (2023). A similar issue regarding section 775.022 in this context is currently pending before the Second District Court of Appeal in *State v. Adams*, No. 2D2024-1089.

[2] *Hurst I* and this Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *overruled in State v. Poole*, 297 So. 3d 487 (Fla. 2020) ("*Hurst II*") are, at times, referenced collectively herein as *Hurst* where distinguishing between the decisions is unnecessary.

The Florida Public Defenders Association ("FPDA") is a non-profit corporation whose members include 19 elected Public Defenders and nearly 2,000 employees of public defender offices throughout Florida. FPDA assists the elected Public Defenders in fulfilling their constitutional duty to ensure equal justice for all.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

Advancing Real Change, Inc. ("ARC") is a non-profit organization with offices in Jacksonville and Baltimore, Maryland, that provides mitigation investigations in capital and non-capital cases in Florida and throughout the United States. In addition to direct casework, ARC trains and educates approximately 2,000 criminal defense practitioners annually regarding the effective collection and presentation of mitigating evidence.

Conservatives Concerned About the Death Penalty, a project of Equal Justice USA, is a network of political and social conservatives who question the alignment of capital punishment with conservative principles and values.

Craig Trocino, Esq. is Associate Professor of Clinical Legal Education and the director of the University of Miami School of Law's Innocence Clinic. The Innocence Clinic is a member of the Innocence Network and is dedicated to identifying and exonerating the wrongfully convicted in Florida.

Death Penalty Focus is a non-profit organization based in California that brings together a broad coalition of groups and individuals—including not only death row inmates and their families, but also law enforcement, corrections personnel, former prosecutors and judges, victims of crime and their families, clergy and faith leaders, community leaders, elected officials, and exonerees—to promote fairness and justice in criminal prosecutions and sentencing.

Florida Justice Institute is a non-profit public interest law firm that uses impact litigation to improve the lives of Florida's poor and disenfranchised residents, while focusing on criminal justice reform,

homelessness and poverty, disability access, and other civil rights issues.

Floridians for Alternatives to the Death Penalty is a statewide non-profit organization working to end the death penalty in Florida, including through education.

Ripley Whisenhunt, PLLC is a law firm specializing in capital defense and complex litigation. The firm is committed to ensuring that all people are treated with dignity and respect.

Witness to Innocence is a non-profit organization led by death row exonerees whose mission is to empower exonerated death row survivors to be the most powerful and effective voice in the fight to end the death penalty and reform the U.S. justice system.

The 8th Amendment Project brings together dozens of national, state, and local partners around a shared strategy to achieve repeal and discourage use of the death penalty by working to change the public discourse about capital punishment in the United States.

SUMMARY OF ARGUMENT

In 2023, Florida amended its capital sentencing scheme to lower the standard for imposing a death sentence. § 921.141, Fla. Stat.

(2023) (the "8-4 Statute"). With the 8-4 Statute, Florida has the lowest standard for imposing a sentence of death in the nation.

This Court must decide whether trial courts can apply the 8-4 Statute in cases like Mr. Jackson's—*i.e.*, cases where a *Hurst* resentencing proceeding was pending when the 8-4 Statute went into effect (April 20, 2023, the "Effective Date"). This issue affects over 40 of the 145 people who were granted *Hurst* relief.

Data on the *Hurst* resentencing proceedings show that whether a capital defendant was resentenced under Florida's post-*Hurst* unanimity statute or the 8-4 Statute is the quintessential game of chance. As of March 31, 2024, only 17 (17.3%) of the 98 completed *Hurst* resentencing proceedings (under both the unanimity and 8-4 standards) resulted in a resentence of death. Only *one case* as of March 31, 2024, resulted in a resentence of death under the 8-4 Statute—Mr. Jackson's.

Capital punishment, where the difference is life or death, is the one place where such arbitrariness cannot be tolerated. The imposition of death under the 8-4 Statute in cases like Mr. Jackson's violates capital defendants' constitutional rights against the arbitrary infliction of the death penalty and right to equal protection. Thus,

this Court should hold that the 8-4 Statute cannot apply to *Hurst* resentencing proceedings and, instead, the trial courts must apply Florida's post-*Hurst* unanimity statute, which was in place when this Court granted prisoners like Mr. Jackson *Hurst* relief.

ARGUMENT

I. Applying the 8-4 Statute to *Hurst* resentencing proceedings violates capital defendants' rights under the U.S. and Florida Constitutions.

Both the U.S. and Florida Constitutions provide fundamental protections to capital defendants that must be upheld throughout the capital sentencing process. As explained below, applying the 8-4 Statute to *Hurst* resentencing proceedings like Mr. Jackson's violates these rights.

A. The history of capital sentencing in Florida after *Hurst* set the stage for the 8-4 Statute to be applied arbitrarily.

From 1973 until 2016, the trial court could impose the death penalty if the jury recommended a sentence of death by at least a vote of 7-5. § 921.141, Fla. Stat. (2015); *see State v. Poole*, 297 So. 3d 487, 495 (Fla. 2020) (stating that this "statutory framework . . . governed Florida's capital sentencing proceedings from 1973" after *Furman v. Georgia*, 408 U.S. 238 (1972), until 2016). Mr. Jackson

and his two codefendants, Alan Wade and Tiffany Cole, were originally sentenced to death under this statute following the jury's nonunanimous recommendations for death in each of their cases. *Jackson v. State*, 127 So. 3d 447, 451 (Fla. 2013) (jury vote 8-4 on both counts); *Wade v. State*, 41 So. 3d 857, 865 (Fla. 2010) (jury vote 11-1 on both counts); *Cole v. State*, 36 So. 3d 597, 603 (Fla. 2010) (jury vote 9-3 on both counts).

But in *Hurst I*, the U.S. Supreme Court held that this statute violated capital defendants' right to jury trial under the Sixth Amendment to the U.S. Constitution because it did not "require the jury to make the critical findings necessary to impose the death penalty." 577 U.S. at 98. The Supreme Court remanded to this Court for further proceedings. *Id.* at 103.

On remand, this Court held that—under the Sixth Amendment (as discussed in *Hurst I*), along with article I, section 22, of the Florida Constitution, as well as the Eighth Amendment to the U.S. Constitution—the jury must unanimously find that (a) the State proved each aggravating factor beyond a reasonable doubt, (b) the aggravators are sufficient for a sentence of death, (c) the aggravation outweighs the mitigation, and (d) death is the appropriate sentence.

Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) ("*Hurst II*"). After *Hurst II*, the Florida Legislature amended Florida's capital sentencing statute to comply with the Court's holding. Ch. 2017-1, Laws of Fla.; *see* § 921.141, Fla. Stat. (2017) (the "Unanimity Statute"). Almost all of the 386 people on Florida's death row at the time sought *Hurst* relief—inundating the trial courts and this Court with cases. *See Asay v. State*, 210 So. 3d 1, 20 (Fla. 2016) (386 inmates on death row at the time).

This Court applied *Hurst* retroactively to prisoners whose sentences of death became final after June 24, 2002—the day the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), which was the precursor to *Hurst I*. *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) (applying *Hurst* retroactively to sentences of death that became final after *Ring*); *Asay*, 210 So. 3d at 22 (holding that *Hurst* did not apply retroactively to sentences of death that became final before *Ring*).

If *Hurst* applied to a prisoner's case, the Court reviewed whether the *Hurst* error was harmless beyond a reasonable doubt. *See Hurst II*, 202 So. 3d at 68-69. If the original jury's recommendation for death was not unanimous, the Court determined the *Hurst* error was

not harmless beyond a reasonable doubt, vacated the sentence(s) of death, and remanded for a new penalty phase. *See id.*; *see also Davis v. State*, 207 So. 3d 142, 173-74 (Fla. 2016) (setting forth the *Hurst* harmless error standard in more detail). Based on this framework, over 150 people on Florida's death row were eligible for *Hurst* relief.[3]

In total, 145 people (37.6% of the 386 people on death row when *Hurst* was decided) received *Hurst* relief (*Resentencing Data*, *supra* note 3), including Mr. Jackson and his codefendants, Mr. Wade and Ms. Cole.[4] *See Jackson*, 306 So. 3d at 938 (noting that the State did

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[3] The data presented herein was compiled through research into each of the *Hurst* resentencing cases. A summary of the data can be accessed at *Resentencing Status of Florida Prisoners Sentenced to Die by Non-Unanimous Juries*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring (last visited May 10, 2024) [hereinafter *Resentencing Data*].

For further analysis on how this Court's post-*Hurst* framework affected the 386 prisoners on Florida's death row when *Hurst* was decided, see generally Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 Colum. Human Rights L. Rev. 936 (2020), and Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 U. Miami L. Rev. 990 (2020).

[4] In addition to the 145 people who received *Hurst* relief, 5 prisoners who would have been entitled to *Hurst* relief obtained relief on other grounds: 2 (Raymond Bright and Victor Caraballo) were granted relief

not appeal the postconviction court granting Jackson *Hurst* relief); *State v. Wade*, No. SC17-886, 2017 WL 2291293 (Fla. May 25, 2017) (State dismissed appeal from Wade being granted *Hurst* relief); *Cole v. State*, 221 So. 3d 534, 536 (Fla. 2017) (granting *Hurst* relief). Trial courts continued facilitating *Hurst* resentencing proceedings under the Unanimity Statute.

In 2020, this Court receded from *Hurst II* in *Poole*, holding that *Hurst I* requires only that the jury find beyond a reasonable doubt "the existence of one or more statutory aggravating circumstances." 297 So. 3d at 502-03. Shortly after *Poole*, due to the new standard, the State sought to cancel Mr. Jackson's *Hurst* resentencing proceeding and reinstate his previously vacated death sentences. *See*

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on other grounds, 2 (Clemente Aguirre-Jarquin and Ralph Wright, Jr.) were exonerated, and Jason Simpson pled to a lesser-included offense.

Further, two prisoners' *Hurst* claims (Darious Wilcox and James Herard) are not yet resolved. *See Wilcox v. State*, No. SC2023-1498; *Herard v. State*, No. SC15-391. Andrew Gosciminski died while on death row on November 13, 2020 (*Inmate Release Information Detail*, Fla. Dep't Corrs., https://fdc.myflorida.com/offendersearch/ (last visited May 14, 2024)), before his *Hurst* claim was resolved. Two prisoners (William Silvia, and William Davis) waived postconviction and, therefore, did not seek *Hurst* relief. Carlton Francis was determined incompetent before *Hurst*. Mark Poole was denied *Hurst* relief. *Poole,* 297 So. 3d 487.

generally State v. Jackson, 306 So. 3d 936 (Fla. 2020). This Court denied the State's request, holding that sentences of death that were vacated before *Poole* could not be reinstated. *See generally id.* Resentencing proceedings continued under the Unanimity Statute.

In 2023, after Nikolas Cruz was sentenced to life imprisonment without parole following the jury's nonunanimous recommendation for death, Florida enacted the 8-4 Statute. Ch. 2023-23, Laws of Fla. Under the 8-4 Statute, a trial court can impose a sentence of death if the jury (1) unanimously finds that the State proved one aggravating factor beyond a reasonable doubt, and (2) recommends a sentence of death by a vote of at least 8-4. § 921.141, Fla. Stat. (2023).[5]

B. Data show that the 8-4 Statute has been applied to *Hurst* resentencing proceedings based on chance rather than reason or logic.

On the Effective Date of the 8-4 Statute, 85 (58.6%) of the 145 resentencing proceedings had been completed. Fifty-seven (39.3%)

[5] Under the 8-4 Statute, the trial court is not required to impose a sentence of death if the jury recommends death. § 921.141(3)(a)2, Fla. Stat. (2023). However, the trial court must explain its reasoning in writing if it departs from the jury's recommendation. *Id.* § 921.141(4).

remained pending—including Mr. Jackson's, whose resentencing began just weeks after the Effective Date. From *Hurst* to the Effective Date, the 145 prisoners granted *Hurst* relief had the following outcomes:

Outcome	**#**
Resentenced to Life	70
Resentenced to Death Under the Unanimity Statute	15
Died on Death Row Awaiting Resentencing	3
Resentencing Pending on the Effective Date	57
Total	**145**

Resentencing Data, supra note 3.[6]

The status of 15 of the cases pending as of the Effective Date changed between the Effective Date and March 31, 2024: 2 prisoners (Dane Abdool and Mr. Jackson) were resentenced to death, 11 prisoners were resentenced to life, and 2 prisoners died. *Resentencing Data, supra* note 3. Mr. Jackson is the only person thus far to be resentenced to death under the 8-4 Statute; Mr. Abdool was

[6] For the cases pending as of the Effective Date, the new penalty phase could have been complete but sentencing outstanding. For the cases in the "Other" category, either their claims for *Hurst* relief remain pending or they were not granted *Hurst* relief for case-specific reasons.

resentenced under the Unanimity Statute. *Resentencing Data, supra* note 3; *see supra* note 6.

As of March 31, 2024, the 145 prisoners granted *Hurst* relief had the following outcomes:

Outcome	**#**
Resentenced to Life	81
Resentenced to Death Under the Unanimity Statute[7]	16
Resentenced to Death Under the 8-4 Statute (Michael Jackson)	1
Died on Death Row Awaiting Resentencing	5
Resentencing Pending on the Effective Date[8]	42
Total	**145**

Resentencing Data, *supra* note 3. In addition to Mr. Jackson, each of the prisoners whose resentencing remained pending as of March 31,

[7] The prisoners resentenced to death under the Unanimity Statute as of March 31, 2024, are Dane Abdool, Thomas Bevel, Michael Bargo, Matthew Caylor, Allen Cox, Randall Deviney, Wayne Doty, Thomas Fletcher, Gerhard Hojan, Jonathan Lawrence, Norman Mckenzie, Johnathan Mosley, Jr., Rodney Newberry, Roderick Orme, John Sexton, and Donald Williams.

[8] In several of the cases that remained pending as of March 31, 2024, the new penalty phase is complete but sentencing outstanding. For example, on January 31, 2024, a jury recommended by a vote of 9-3 that Bessman Okafor be resentenced to death; his sentencing is currently scheduled for June 24, 2024. *State v. Okafor*, No. 2012-CD-014950-A-O (Fla. 9th Jud. Cir.).

2024, could be affected by the issue presented in this case—whether a trial court can constitutionally apply the 8-4 Statute to a *Hurst* resentencing that was pending on the Effective Date.[9] This issue affects over 40 people on Florida's death row.

C. The arbitrary way in which the 8-4 Statute has been applied to *Hurst* resentencing cases violates the Eighth Amendment to the U.S. Constitution and article I, section 17, of the Florida Constitution.

Separate from the right to jury trial, the U.S. and Florida Constitutions guarantee criminal defendants the right against cruel and unusual punishment. U.S. Const. amend. VIII; art. I, § 17, Fla. Const.[10] The U.S. Supreme Court has made clear that this right includes protection against the arbitrary infliction of the death

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[9] This Court previously dismissed several petitions seeking review of non-final orders that presented a similar issue, holding that the issue was more appropriately raised and addressed on direct appeal. *See generally Gonzalez v. State*, 375 So. 3d 886 (Fla. 2023). Mr. Jackson's case is the Court's first opportunity to address the issue on direct appeal. Also, *Amici* recognize that this Court will be asked to address the applicability of the 8-4 Statute to cases that were pending trial for the first time on the Effective Date (*e.g.*, *Zieler v. State*, No. SC2023-1003). That is different than the issue here.

[10] The right against cruel and unusual punishment in the Florida Constitution is "construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment . . . ." Art. I, § 17, Fla. Const.

penalty. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (same). Accordingly, each state that maintains capital punishment has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

As the data discussed above show, the way *Hurst* resentencing proceedings have unfolded in Florida is the quintessential game of chance. The procedural roulette that Florida's death row prisoners have been forced to play since *Hurst* is the epitome of the arbitrariness the Eighth Amendment bars in capital punishment. *E.g.*, *Gregg*, 428 U.S. at 189; *Godfrey*, 446 U.S. at 428. *See generally Furman*, 408 U.S. 238.

1. There is no justifiable explanation for which defendants received the benefit of the Unanimity Statute at resentencing.

Whether a prisoner received the benefit of *Hurst* in the first place turned on arbitrary line-drawing based on the date the prisoner's sentence(s) became final. *See supra* Part I.A. A sentence of death becomes final either 90 days after this Court's decision on direct appeal becomes final, or when the U.S. Supreme Court disposes of the petition for writ of certiorari from this Court's decision on direct appeal. Fla. R. Crim. P. 3.851(d)(1). Therefore, the date a sentence of death becomes final depends on numerous factors outside the defendant's control, including (1) how long it takes for the trial to occur in the first instance, (2) how long it takes this Court to render a decision on direct appeal, and (3) how long it takes the U.S. Supreme Court to render its decision on the petition for writ of certiorari from this Court's decision on direct appeal. The date of finality would also change if the defendant received a new trial for any reason before *Hurst*—which would restart the process above.

Then, whether a prisoner who obtained *Hurst* relief received the benefit of the Unanimity Statute on resentencing was just as random. Ultimately, it depended on whether the resentencing was complete

on the Effective Date. Again, this turns on various factors outside the defendant's control, including (1) the trial court's schedule, especially in light of COVID-19, (2) natural events like hurricanes, (3) attorneys' schedules, (4) interlocutory appeals prior to resentencing, and (5) the availability of witnesses. Indeed, several of these factors affected Mr. Jackson's resentencing. *See* Jackson Br. 3-5.

Mr. Jackson's case illustrates this uncertainty. While Mr. Jackson was waiting for his resentencing, his codefendant, Alan Wade, was resentenced to life imprisonment without parole under the Unanimity Statute after the jury did not unanimously find that the aggravation outweighed the mitigation. R.2920-23; *see* § 921.141(2)(b)2, Fla. Stat. (2017).[11] In fact, Mr. Jackson was originally supposed to be retried with Mr. Wade but was severed at the last minute. Jackson Br. 5.

When Mr. Jackson's resentencing finally proceeded in May 2023 after being rescheduled several times (Jackson Br. 3-5), the 8-4 Statute was in place and the standard for imposing a sentence of

[11] Tiffany Cole, Mr. Jackson's other codefendant, was resentenced to life imprisonment without parole later in 2023 under the 8-4 Statute. Judgment, *State v. Cole*, No. 16-2005-CF-10263-DXXX-MA (Fla. 4th Jud. Cir. Aug. 23, 2023).

death was no longer unanimity, as it was when this Court granted Mr. Jackson *Hurst* relief.

After the jury recommended death by a vote of 8-4 (R.3331-36, the *same* jury vote that preceded his vacated sentences of death), the trial court resentenced Mr. Jackson to death. R.3410-16. Had Mr. Jackson's resentencing proceeded just months earlier under the Unanimity Statute, he would have received a different sentence (like Mr. Wade did).[12] Imposing sentences of death based on chance is the antithesis of the protections afforded by the Eighth Amendment and, likewise, article I, section 17, of the Florida Constitution.

2. It is unconstitutional to apply the 8-4 Statute to a minority of the *Hurst* resentencing cases based merely on timing.

Resentencing a prisoner to death under the 8-4 Statute in a *Hurst* resentencing proceeding also violates the Eighth Amendment by creating a subset of *Hurst* cases in which death is imposed differently, or unusually.

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[12] While *Amici* recognize that this Court receded from its precedent on relative culpability (*Cruz v. State*, 372 So. 3d 1237 (Fla. 2023)), it is worth noting that Mr. Jackson would have had a relative culpability claim prior to *Cruz* based on Mr. Wade being resentenced to life. *See also* Jackson Br. 54-56. This is especially true considering Mr. Wade's original jury vote for death (11-1) was higher than the jury's vote for death in both of Mr. Jackson's trials (8-4).

As the data above show, only a small percentage of *Hurst* resentencing proceedings have resulted in the defendant being resentenced to death. *Supra* Part I.B. As of March 31, 2024, only 17 (17.3%) of the 98 completed proceedings (under both the Unanimity and 8-4 Statute) resulted in a resentence of death. *Supra* Part I.B. Only *one case* as of March 31, 2024, resulted in a resentence of death under the 8-4 Statute—Mr. Jackson's. *Supra* Part I.B. Including Mr. Jackson, over 40 prisoners risk finding themselves in the same category. *Supra* Part I.B.

There is no reasonable explanation for which cases were retried under the Unanimity Statute and which cases were retried under the 8-4 Statute. Now, this Court should rectify the unconstitutional arbitrariness created by this new subset of cases. Doing so does not require the Court to address the constitutionality of the 8-4 Statute itself but, rather, merely asks this Court to level the playing field for those prisoners who were granted a new penalty phase after *Hurst*.

D. Applying the 8-4 Statute to a minority of *Hurst* resentencing cases violates capital defendants' right to equal protection under the U.S. and Florida Constitutions.

Both the U.S. and Florida Constitutions guarantee the right to equal protection. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); art. I, § 2, Fla. Const. ("All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property.").

Even applying the lowest standard for reviewing whether the application of a statute violates the right to equal protection, a law cannot be applied in a way that creates an unexplainable or arbitrary classification of people. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting *Sioux City Bridge Co. v.*

Dakota Cnty., 260 U.S. 441, 445 (1923)) (internal quotation marks omitted)); *see also Dep't of Health & Rehab. Servs. v. Heffler*, 382 So. 2d 301, 302 (Fla. 1980) ("Any classification must bear a just and reasonable relation to a legitimate purpose." (quoting *In re Estate of Reed*, 354 So. 2d 864, 865 (Fla. 1978))).

While the 8-4 Statute does not make any classification on its face, the data show that applying the 8-4 Statute to prisoners like Mr. Jackson on *Hurst* resentencing violates prisoners' right to equal protection by creating a "class of one." *Village of Willowbrook*, 528 U.S. at 564; *see supra* Part I.A. Cases like Mr. Jackson's (retried after the Effective Date) cannot be logically distinguished from cases like Mr. Wade's (retried before the Effective Date).

Mr. Jackson and Mr. Wade were both tried for the same crime. Both were originally sentenced to death after nonunanimous jury recommendations for death, and both were granted *Hurst* relief in 2017. *Supra* Part I.A. Yet, only one of them received the benefit of the Unanimity Statute (the standard when this Court granted *Hurst* relief) on resentencing.

The date on the calendar is not a rational basis for treating similarly situated prisoners differently, especially where it means the

difference between life and death. Accordingly, applying the 8-4 Statute to *Hurst* resentencing proceedings violates prisoners' right to equal protection under both the U.S. and Florida Constitutions.

CONCLUSION

The U.S. and Florida Constitutions require that sentences of death be imposed with the highest regard to applicable constitutional standards. As the data discussed above demonstrate, the way *Hurst* resentencing proceedings have played out across Florida violates fundamental safeguards against unconstitutional death sentences. Accordingly, this Court should hold that the 8-4 Statute cannot apply to *Hurst* resentencing proceedings.

Date: May 23, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of *Amici Curiae* complies with the applicable font and word-count requirements in Florida Rules of Appellate Procedure 9.210(b) and 9.370(b). It was prepared in Bookman Old Style 14-point font and contains 4,409 words, excluding "[t]he cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block for the brief's author." Fla. R. App. P. 9.210(a)(E).

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2024, a true and correct copy of the foregoing Brief of *Amici Curiae* was filed electronically with the Court via the Florida E-Filing Portal, which provides notice to all parties.

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