Case No. 15A424

In the Supreme Court of the United States

JERRY WILLIAM CORRELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE AND CONSOLIDATED BRIEF OF AMICUS CURIAE, THE CAPITAL HABEAS UNIT OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF FLORIDA AND PRIVATE/REGISTRY FLORIDA COUNSEL, SUPPORTING THE APPLICATION FOR A STAY OF EXECUTION FILED BY PETITIONER

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MOTION FOR LEAVE TO FILE UNDER RULE 37

The Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida, as amicus curiae, and the undersigned private and registry Florida counsel, as amicus curiae, respectfully move for leave to file the accompanying brief in support of the application for a stay of execution filed by Jerry William Correll, a Florida inmate whose execution is scheduled for October 29, 2015.

The Statement of Interest describes the interest of the amici and their belief that the argument presented by the brief will be helpful to the Court.

Counsel for Petitioner has agreed to the filing of the accompanying brief. Counsel for Respondent, representing the State of Florida, objects to the filing of the brief.

Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel for amicus curiae state that no counsel for a party authored the accompanying brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

INTEREST OF AMICUS CURIAE[1]

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida was established with the concurrence of the Chief Judge of the United States Court of Appeals for the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court for the Northern District of Florida (the Honorable M. Casey Rogers), and the Administrative Office of the United States Courts. The CHU was established because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concerns for the Bench and Bar. As the Court of Appeals for the Eleventh Circuit commented:

> Establishing a CHU in one of [Florida's] . . . federal districts would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, . . . but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings.

Lugo v. Secretary, 750 F.3d 1198, 1215 (11th Cir. 2014); *see also Banks v. Secretary*, 592 F. App'x 771, 774 (11th Cir. 2014) (Carnes, C.J., concurring) ("Fortunately, since [*Lugo*] a capital habeas unit has been approved and is currently being established in the Northern District of Florida . . . .").

As the institutional federal capital defender office of Florida, the Amicus Curiae CHU wishes to provide this Court with its perspective on the Florida Supreme Court's resistance to a core tenet of the constitutional law applicable to capital sentencing: that the jury's role should not be minimized. Unlike the current view of any other state in the nation, Florida's high court holds on to an outmoded belief about capital sentencing: that even if juries should play a role, that role should not be one with real effects.

Further and significantly for purposes of this filing, the CHU represents or assists and advises in the representation of a good number of death-sentenced prisoners in Florida. In at least some of those cases, this Court's decision in *Hurst v. Florida*, No. 14-7505 (argued Oct. 13, 2015), and

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actions on Mr. Correll's stay application may make the difference between life or death.

Attorneys Martin McClain, Linda McDermott and Todd Scher also represent clients sentenced to death in Florida for whom this Court's actions in *Hurst* and *Correll* may have a life-or-death effect. As "registry" and/or court-appointed Criminal Justice Act counsel, they have represented, and continue to represent dozens of Florida death sentenced inmates. As Amicus Curiae they bring to the Court their unique perspective on the Florida Supreme Court's practice.

ARGUMENT

The Florida Supreme Court has held onto a constricted view of this Court's Sixth and Eighth Amendment precedents regarding the role of the jury in capital sentencing. That constricted view may well be why Florida has the largest death row of any state within the Eleventh Circuit and one of the three largest in the nation.

This Court's decision in *Hurst v. Florida*, No. 14-7505 (argued Oct. 13, 2015), may impact the Florida Supreme Court's conception of the constitutionality of Florida's death penalty scheme. If this Court determines that the role of the jury in Florida's capital sentencing procedure is inconsistent with the Sixth and/or Eighth Amendments, then the Florida Supreme Court may well revisit Mr. Correll's case. In that event, an order from this Court granting Mr. Correll's petition, vacating the state court judgment, and remanding for further proceedings in light of *Hurst* would be appropriate. Mr. Correll therefore seeks a stay of execution from this Court pending this Court's guidance in *Hurst*. Amicus Curiae support that application.

1. The Florida Supreme Court's Idea that *Ring* Does Not Apply in Florida

In *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), the Florida Supreme Court ruled that *Ring v. Arizona,* 536 U.S. 584 (2002), is not retroactive under Florida law because *Ring* had no applicability to Florida's capital sentencing scheme. *Johnson* outlined the Court's earlier decisions espousing that *Ring v. Arizona* did not apply in Florida:

> We first analyzed *Ring*'s effect on Florida law in two plurality opinions, *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). Both opinions noted that the United States Supreme Court repeatedly has upheld Florida's capital sentencing scheme. *Bottoson*, 833 So. 2d at 695; *King*, 831 So. 2d at 143.

Johnson, 904 So. 2d at 406.

The last sentence is the rub: the Florida Supreme Court believes that because, prior to *Ring*, this Court upheld Florida's original approach to capital sentencing, decisions such as *Ring* and others describing the

significance of the jury's role in the death penalty sentencing process simply do not apply in Florida. Since *Johnson*, the Florida Supreme Court has steadfastly maintained that *Ring* is irrelevant to Florida's capital sentencing scheme. *See Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003).

Hurst may alter the Florida Supreme Court's view of the Sixth Amendment. Until *Hurst* resolves the question of whether the Florida Supreme Court's belief that *Ring* is inapplicable in Florida is correct, the validity of that court's limited view of *Ring* is in real doubt.

Significantly, the State's representatives in this Court disagree with the Florida Supreme Court. At oral argument in *Hurst*, the State conceded that *Ring* does indeed apply in Florida, and that *Ring* requires that the jury make the death eligibility determination or that the eligibility determination be established by admission. *See* Tr. at 37 ("MR. WINSOR: That was before *Ring*. And we're not contesting that *Ring* would require a jury finding or an admission of those elements.").

Amicus Curiae urge that the Court stay Mr. Correll's execution until the important questions arising from the Florida Supreme Court's view of the Sixth Amendment are resolved.

2. The Florida Supreme Court's Limited View of the Application of the Eighth Amendment to Florida Capital Sentencing

The Florida Supreme Court has not come to terms with Eighth Amendment considerations either. This Court has held:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case.

Johnson v. Mississippi, 486 U.S. 578, 584 (1988). More recently, in the Eighth Amendment context, this Court noted that the Eighth Amendment mandates that "[p]ersons facing th[e] most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014).

While the applicability of *Ring* is at issue in *Hurst* in the context of the Sixth Amendment, *Hurst* is also a case about the Eighth Amendment. In

fact, the recent oral argument in *Hurst* highlights this Court's disquiet about whether Florida's capital sentencing scheme is consistent with the Eighth Amendment.

During oral argument, Justice Sotomayor asked whether a unanimous verdict or a verdict that is functionally equivalent to a unanimous verdict is required in capital cases under the Eighth Amendment. *See* Tr. at 10-11, 25-26, 43-44, 45. Justice Scalia also posed questions as to whether unanimity was a requirement. *See id.* at 12. Justice Ginsburg asked whether a 7-5 death recommendation was the equivalent of a unanimous verdict. *See id.* at 45. Justice Kagan asked whether the jury's findings underlying a death recommendation are part of the record and available for review by the appellate courts. *See id.* at 49-50.[2]

Finally, Justice Ginsburg directly raised concerns about whether Florida's capital sentencing scheme comports with the Eighth Amendment principle set forth in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *See id.* at 36-37. Immediately thereafter, Justice Scalia expressed skepticism as to Florida's compliance with *Caldwell*. *See id.* Appendix B ("I'm talking about what responsibility the jury feels. If the jury knows that if—if we don't—if—if we don't find it an aggravator, it can't be found; or if we do find an aggravator, it must be accepted. That's a lot more responsibility than just, you know, well, you know, if you find an aggravator and you—you weigh it and provide for the death penalty, the judge is going to review it anyway.").

The Florida Supreme Court, in contrast, believes that Florida's capital sentencing scheme—a scheme that permits the jury to return a death recommendation by a majority vote after being instructed that it will "render an advisory sentence"—poses no constitutional problem under the Eighth Amendment. The Eighth Amendment concerns arising from the Florida Supreme Court's limited view of the Eighth Amendment may well be resolved in *Hurst*, further suggesting that a stay is appropriate.

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[2] Meaningful appellate review is an aspect of Eighth Amendment jurisprudence. See Parker v. Dugger, 498 U.S. 308, 321 (1991) ("The Constitution prohibits the arbitrary or irrational imposition of the death penalty . . . . We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e. g., Clemons, supra, at 749 (citing cases); Gregg v. Georgia, 428 U. S. 153 (1976).").

3. The History of Correll's Case Demonstrates that Eighth Amendment Concerns Here are Real and that a Stay of Execution is Appropriate

Correll's death sentence became final in 1988 after *Caldwell* had become controlling Eighth Amendment jurisprudence. *Correll v. State*, 523 So. 2d 562 (Fla. 1988). Correll's jury was instructed under Florida Statute §921.141(2):

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> *(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);*
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(Emphasis added). Accordingly, in order for Correll to be eligible for a sentence of death, the jury had to find not just the presence of an aggravating circumstance, but whether sufficient aggravating circumstances existed to justify a sentence of death. *See Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987) (finding that the "in course of a felony" aggravating circumstance did not justify the imposition of a death sentence because "[t]o hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty."). Yet despite the requirement that the jury must find "sufficient aggravating circumstances," Correll's jurors were instructed that their verdict would be merely "advisory."

In 1990, Correll filed a habeas petition in the Florida Supreme Court challenging his death sentence under *Caldwell*. In his habeas petition, Correll detailed "prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the Eighth amendment." Amended Petition, *Correll v. Dugger*, Florida Supreme Court No. 75-583, at 115-16. The prosecutorial and judicial comments, and the jury instructions, that undermined the jury's sense of responsibility were set out and quoted at length. *Id*. at 118-22. Specifically, Correll argued:

> The *Caldwell* violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in *Caldwell*: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no *Caldwell* error can be deemed to have had "no effect" on the verdict.

Id. at 126.

The Florida Supreme Court denied Correll's habeas petition. *Correll v. Dugger*, 558 So. 2d 422, 427 (Fla. 1990). In a footnote, the Court indicated that Correll's *Caldwell* claim either was or should have been raised on direct appeal. *Id.* at 426 n.6. The Court did not mention that by the time of Correll's direct appeal, it had already ruled in *Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985), that under Florida's sentencing scheme the jury was not responsible for the sentence and thus Caldwell was inapplicable in Florida:

> In *Caldwell*, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellate review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Also not mentioned was *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986), where the Court again rejected the applicability of *Caldwell* to Florida:

> Under Mississippi law it is the jury who makes the ultimate decision as to the appropriateness of the defendant's death. *See* Miss.Code Ann. § 99-19-101 (Supp. 1985). Whereas, in Florida it is the trial judge who is the ultimate "sentencer." *See Thompson v. State*, 456 So. 2d 444 (Fla.1984). The jury's recommendation, although an integral part of Florida's capital sentencing scheme, is merely advisory. *See* § 921.141(2), Fla.Stat. (1985). This scheme has been upheld against constitutional challenge. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Also not mentioned was *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987), where the Court again held that *Caldwell* was inapplicable to Florida's jury

instructions:

> Appellant's final argument is that the jury's role was denigrated in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by advising it that its recommendation was advisory and that the judge was the ultimate sentencer. This is a correct statement of the law. We are satisfied that the jury instructions properly stress the importance of the jury role in making its advisory recommendation.

Nor was *Foster v. State*, 518 So. 2d 901, 901-02 (Fla. 1987), mentioned, where the Court wrote: "Foster's claim could not be sustained on its merits because unlike *Caldwell*, in Florida the judge rather than the jury is the ultimate sentencing authority."

If nothing else, the current proceedings in *Hurst v. Florida* tell us that the Florida Supreme Court's limited perspective could well be off the mark. In *Hurst,* this Court could tell us whether Florida's capital sentencing scheme is in compliance with *Caldwell*.

As with *Caldwell*, the Florida Supreme Court was also limited in its earlier view of *Lockett v. Ohio*, 438 U.S. 586 (1978). *Lockett* was an Eighth Amendment case. The Florida Supreme Court originally asserted that *Lockett*—which held that sentencers must not be restrained in their consideration of mitigating factors—did not apply in Florida. It was only after this Court unanimously held otherwise that the Florida Supreme Court expanded its view of the scope of the Eighth Amendment with respect to capital sentencers' consideration of mitigating evidence.

If *Hurst* holds that *Caldwell* has meaning in Florida, then the Florida Supreme Court is most likely to revisit its holdings that *Caldwell* does not apply, just as it did once its *Lockett* decisions fell after *Hitchcock v. Dugger*, 481 U.S. 393 (1987), when the Florida Supreme Court recognized that it had been wrong about the Eighth Amendment all along. *See Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).[3]

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[3]*Lockett v. Ohio* determined that mitigating factors must not be restricted such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586,

In *Copeland v. Dugger,* 484 U.S. 807 (1987), this Court vacated the decision below in light of *Hitchcock*, and the Florida Supreme Court on remand revisited its prior decision denying post-conviction relief. *Copeland v. Dugger*, 565 So. 2d 1348 (Fla. 1990). A similar approach would be appropriate here. After all, the Eighth Amendment guarantees that "[p]ersons facing th[e] most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S.Ct. at 2001. Correll seeks to invoke that right pending the decision in *Hurst*, which may provide him with the means to demonstrate "that the Constitution prohibits [his] execution."

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604 (1978). The Florida Supreme Court interpreted *Lockett* to require only that a capital defendant have the opportunity to present any "nonstatutory" mitigation evidence but believed that *Lockett* did not require that jurors know they actually could rely upon that "nonstatutory" evidence when deciding whether to recommend an "advisory" sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, this Court made clear that the Florida Supreme Court was wrong on the Eighth Amendment. The Florida Supreme Court then rethought its belief about *Lockett*, because *Hitchcock* was "a substantial change in the law,"*see Delap*, 513 So. 2d at 660.

CONCLUSION

There is a reasonable probability that the *Hurst* decision will provide guidance that the Florida Supreme Court would follow in a number of cases, including Mr. Correll's. Mr. Correll seeks to live until the decision in *Hurst* answers important unresolved questions affecting the proceedings in his case. Amicus Curiae support that application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon counsel for Petitioner, Raheela Ahmed, Law Office of The Capital Collateral Regional Counsel–Middle Region, 3801 Corporex Park Drive, Ste. 210, Tampa, FL 33619, ahmed@ccmr.state.fl.us, and counsel for Respondent, Carol Dittmar, Asst. Attorney General, Concourse Center, 3507 Frontage Rd., Ste. 200, Tampa, FL 33607, carol.dittmar@myfloridalegal.com, on this 26th day of October, 2015, both electronically and by United States Mail postage prepaid.

s/Billy H. Nolas
Billy H. Nolas