NO. _____

In the Supreme Court of the United States

JERRY WILLIAM CORRELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

EXECUTION SCHEDULED FOR OCTOBER 29, 2015 AT 6:00 P.M.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Florida's death sentencing scheme under Florida Statute § 921.141, which permits a death sentence based on a non-unanimous, non-specific, and non-binding jury recommendation, violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and is inconsistent with *Ring v. Arizona*, 536 U.S 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)? *

2. Whether the totality of the punishment the State has imposed on Correll violates the Eighth and Fourteenth Amendments to the United States Constitution in light of *Lackey v. Texas*, 514 U.S. 1045, 115 S .Ct. 1421, 131 L.Ed. 2d 304 (1995)?

* This question is the same as that presented in *Hurst v. Florida*, No. 14-7505, currently awaiting decision by the Court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Correll was the Appellant below. The State of Florida was the Appellee below.

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

DEATH PENALTY CASE

Petitioner, Jerry William Correll, respectfully requests that this Court issue a writ of certiorari to review the judgment below.

CITATION TO OPINIONS BELOW

The decision of the Supreme Court of Florida sought to be reviewed appears as *Correll v. State*, SC15-147, --- So. 3d ---, 2015 WL 5771838 (Fla. Oct. 2, 2015), and is attached to this petition as *Appendix A*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Supreme Court of Florida issued its corrected opinion denying relief on October 6, 2015. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

> **The Sixth Amendment to the Constitution of the United States**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VIII.

> **The Eighth Amendment to the Constitution of the United States**
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. XIV.

> **The Fourteenth Amendment to the Constitution of the United States**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. § 921.141 (1985). Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. - [1]

> **(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. -** Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as

[1] This is the 1985 version of the statute under which Correll was sentenced. The current statute has been slightly modified, however no changes have been made to the substantive sentencing scheme being challenged by Correll and Hurst.

practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. - 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.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

PROCEDURAL HISTORY

(A) TRIAL COURT AND DIRECT APPEAL PROCEEDINGS

Correll was charged by indictment in the Ninth Judicial Circuit, Orange County, Florida, with four counts of first-degree murder for the murders of his ex-wife's mother, Mary Lou Hines (Count I), his ex-wife, Susan Correll (Count II), his ex-wife's sister, Marybeth Jones (Count III), and his five-year old daughter, Tuesday Correll (Count IV). A jury trial was held, and Correll was found guilty as charged on February 6, 1986. The penalty phase trial was conducted on February 7, 1986. The jury recommended death by a vote of 9 to 3 on Count II and 10 to 2 on Counts, I, III, and IV. In accordance with Florida procedure, the jury did not specify which aggravating circumstances it relied upon in making its recommendation.

The trial court found the following aggravating factors: Correll had been previously convicted of another capital offense; the murder of Susan Correll was heinous, atrocious, and cruel and was committed during a sexual battery[2]; the murder of Marybeth Jones was committed during a robbery[3] and for the purpose of avoiding arrest; the murder of Tuesday Correll was heinous, atrocious and cruel, committed in a cold, calculated and premeditated manner and was for the purpose of avoiding arrest; and the murder of Mary Lou Hines was heinous, atrocious and cruel. Finding no mitigating factors, the trial court sentenced Correll to death on all four murders. *See Correll v. State*, 523 So. 2d 562, 564 (Fla. 1988), *cert. denied*, 488 U.S. 871, 109 S. Ct 183, 102 L.Ed. 2d 152 (1988).

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[2] Correll was not charged with Sexual Battery.

[3] Correll was not charged with Robbery.

(B) POST-CONVICTION PROCEEDINGS

The Governor of Florida signed a death warrant for Correll on January 10, 1990. On February 22, 1990, Correll filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, alleging that he was denied effective assistance of trial counsel. The post-conviction judge, who was also the trial judge, summarily denied Correll's motion for post-conviction relief. On February 22, 1990, Correll also filed a petition for writ of habeas corpus in the Supreme Court of Florida, alleging ineffective assistance of appellate counsel. On March 16, 1990, after granting two temporary stays of execution, the Supreme Court of Florida denied relief in a consolidated order on the petition for writ of habeas corpus and appellate review of the denial of the Rule 3.850 motion. *See Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990).

On March 16, 1990, Correll filed his initial petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, and the District Court entered an indefinite stay of execution. The action was stayed in 1995 to allow Correll to exhaust a claim based on newly discovered evidence involving the trial testimony of the State's purported blood spatter expert. The federal habeas action was reopened in 1998 after the state court proceedings concluded. *See Correll v. State*, 698 So. 2d 522 (Fla. 1997). The action was again held in abeyance from 2002 to 2005 to await the Supreme Court of Florida's determination of the effect on Florida law of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L. Ed 2d 556 (2002). The trial court's denial of the *Ring* claim was affirmed. *See Correll v. State*, 880 So. 2d 1210 (Fla. 2004). The parties filed updated briefs in December 2010 and January 2011 after the United States District Court for the Middle District of Florida lost the state court record for an unspecified period of time. In an order dated March 19, 2013, the District Court denied Correll's request for a writ of habeas corpus, as

well as a certificate of appealability. *See Correll v. Sec'y, Dep't of Corr.*, 932 F.Supp. 2d 1257 (M.D. Fla. 2013). Correll filed an application for certificate of appealability with the Eleventh Circuit Court of Appeals on May 23, 2013, which the Eleventh Circuit denied on July 25, 2013. A petition for writ of certiorari was filed on October 18, 2013 and denied on January 27, 2014. *See Correll v. Crews*, 134 S.Ct. 1024, 88 L.Ed. 2d 124 (2014).

On January 16, 2015, Governor Rick Scott denied clemency, signed a death warrant for Correll, and set a February 26, 2015 execution date. On January 21, 2015, Correll filed with the circuit court a third successive motion for post-conviction relief, as well as several postproduction requests for additional public records. *Appendix KK*; *MM*. The third successive motion and the records requests were all denied. *Appendix KK*; *QQ-SS*. Correll filed a notice of appeal on January 29, 2015, and briefing was concluded on February 9, 2015.[4] *Appendix II-JJ*. On January 29, 2015, Correll filed with the Supreme Court of Florida an emergency petition for a stay of execution based upon this Court's grant of certiorari in *Glossip v. Gross*, 135 S.Ct. 1173, 190 L.Ed. 2d 929 (2015). On February 4, 2015, the Supreme Court of Florida issued an order relinquishing jurisdiction to the circuit court to allow Correll to file a fourth successive motion for post-conviction relief challenging Florida's three-drug lethal injection protocol. *Appendix BB*. On February 5, 2015, Correll filed his fourth successive motion for post-conviction relief, which the circuit court denied on February 9, 2015. *Appendix EE*; *CC-DD*. On February 17, 2015, the Supreme Court of Florida granted Correll's Emergency Petition for Stay of Proceedings and Stay of Execution pending

[4] The Supreme Court of Florida relinquished jurisdiction and granted a stay of execution based on *Glossip*, prior to the filing of a Reply Brief by Correll appealing the denial of the third successive motion for post-conviction relief.

further order of the Court. On June 29, 2015, this Court released its opinion in *Glossip*. On the same day, the State of Florida filed its Motion to Vacate Stay of Execution. On July 23, 2015, the Supreme Court of Florida issued an order relinquishing jurisdiction to the circuit court to hold an evidentiary hearing on Claim IV only of Correll's fourth successive motion for post-conviction relief, which alleged that Florida's three drug protocol, using midazolam as the first drug, is unconstitutional as applied to Correll. *Appendix J-R*. On August 10, 2015, Correll filed a Second Postproduction Request for Additional Public Records. *Appendix X*. On August 12, 2014, due to the holding in *Glossip* requiring that, in order to challenge a method of execution under the Eighth Amendment, one must allege alternative method that is feasible and readily implemented, Correll filed a "Defendant's Statement Regarding an Alternative Method of Execution Mandated by *Glossip v. Gross*." *Appendix Y*. On August 18, 2015, the circuit court issued an order on the records request. *Appendix W*. The circuit court held an evidentiary hearing on Claim IV of Correll's fourth successive motion for post-conviction relief on August 19, 2015. On August 27, 2015, the circuit court issued an order denying Claim IV. *Appendix V*. On October 2, 2015, the Supreme Court of Florida affirmed the circuit court's denial of Correll's third and fourth motions for post-conviction relief and lifted the stay of execution. *Appendix A-B*. A corrected opinion was issued on October 6, 2015. *See Correll v. State*, SC15-147, --- So. 3d ---, 2015 WL 5771838 (Fla. Oct. 2, 2015); *Appendix A*.

In its opinion, the Supreme Court of Florida specifically addressed and rejected the claims presented here by Issue I (*See infra* page 9) and Issue II (*See infra* page 16).

In a letter dated October 6, 2015, Governor Scott reset Correll's execution for October 29, 2015 at 6:00 p.m. *Appendix TT*.

REASONS FOR GRANTING THE WRIT

ISSUE I

FLORIDA'S UNIQUE STATUTORY SCHEME UNDER WHICH AN INDIVIDUAL LIKE CORRELL MAY BE SENTENCED TO DEATH BY A JUDGE AFTER A NON-BINDING NON-UNANIMOUS JURY RECOMMENDATION THAT DOES NOT SPECIFY THE STATUTORY AGGRAVATING CIRCUMSTANCES ON WHICH IT IS BASED VIOLATES THE SIXTH AND EIGHTH AMENDMENTS.

Under Fla. Stat. § 921.141 a trial judge, not a jury, may impose a sentence of death on the basis of a non-unanimous, non-binding jury recommendation. The statute does not specify the statutory aggravating circumstance(s) on which it is based. *See* Fla. Stat. § 921.141 (3)(2015)[5]. These features of the system violate both the Sixth and Eighth Amendments. Correll, whose jury recommended death by a vote of 9 to 3 on Count II and 10 to 2 on Counts, I, III, and IV, has consistently challenged the constitutionality of Florida's death penalty sentencing scheme on these bases.[6]

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[5] Fla. Stat. § 921.141(3) reads as follows:

> **(3) Findings in support of the sentence of death. –** Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which a sentence of death is based as to the facts . . .

Correll was sentenced in 1986, and this subsection of § 921.141 remains unchanged since that time. *See* Fla. Stat. § 921.141(3) (1985).

[6] The Supreme Court of Florida recognized that Correll has previously raised and maintained that he was sentenced pursuant to an unconstitutional sentencing statute. *See Correll*, --- So. 3d ---, 2015 WL 5771838 at *2; 6; *see Correll v. State*, 880 So. 2d 1210 (Fla. 2004). This question was most recently raised in Correll's third successive motion for postconviction relief, filed on January 21, 2015 prior to the *Hurst* grant of certiorari, and in his Initial Brief to the Supreme Court of Florida. *Appendix II*; *KK*. Furthermore, when the *Ring* decision was rendered, Correll promptly

A. Florida's Unique Capital Sentencing System is Impermissibly Arbitrary Under the Eighth Amendment

Florida is the *only state in the country* where a bare majority of jurors can recommend death without a unanimous finding on any aggravator. *Appendix II*. This defect is exacerbated by the fact that the judge may determine the existence of aggravating factors independently and, indeed, override a jury's life recommendation. While this Court rejected a challenge to the latter two features of the statute in a 5-4 decision more than three decades ago, *see Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed.2d 134 (1983), their existence makes the unique features of Florida's statute all the more inimical to non-arbitrary decision-making.

Viewed as a whole, Florida's capital sentencing scheme is vastly different from that of other jurisdictions. The death penalty is employed by 31 states and the federal government.[7] In every other jurisdiction, a unanimous jury must make the findings required for a defendant to be eligible for the death penalty. *See* Brief for Petitioner at 43, *Hurst v. Florida*, No. 14-7505 (U.S. filed May 28, 2015) (*citing State v. Steele*, 921 So. 2d 538, 548-549 & nn.3-5 (Fla. 2005)). Only Florida allows a simple majority to make any determination in a capital case. *See id.* at 41-42. Thus, only in Florida could an individual be sentenced to death on the basis of an advisory vote by a simple majority of a jury that made no specific determination as to the existence of any particular aggravating circumstance.[8] The result has been a system starkly at odds with the goals of *Furman*

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filed a successive motion for postconviction relief, raising a claim pursuant to that opinion. *See Correll*, 880 So. 2d 1210.

[7] *See* DEATH PENALTY INFORMATION CENTER, *Facts about the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf

[8] *See* Raoul Cantero and Mark Schlakman, *Florida ignores "unanimous jury" legislation in death penalty cases at its peril*, MIAMI HERALD, Feb. 19, 2012, *available at*

v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972): creating a predicable system based on community values that reliably imposed death sentences for a small group of the very worst murders. Florida's death sentencing rates — and its rate of wrongful convictions — are some of the highest in the country. In 2012, Florida had the most death sentences of any state, in 2013 Florida had the second highest number of death sentences of any state, and in 2014 Florida was tied with Texas for the second highest number of death sentences.[9] Florida also has the second largest number of death row inmates of any state in the country and the most death row exonerations of any state.[10]

This case is an appropriate vehicle for resolution of the Eighth Amendment issue. The opinion of the Supreme Court of Florida below rejects Correll's challenge on the merits on the basis of that Court's well-established jurisprudence. *See Correll*, 2015 WL 5771838 at *6 *citing Hunter v. State*, 40 Fla. L. Weekly S231, S234, 2015 WL 1932220 at *1, *8 (Fla. Apr. 30, 2015); *see McLean v. State*, 147 So. 3d 504, 514 (Fla. 2014); *see Kimbrough v. State*, 125 So. 3d 752, 753-54 (Fla.), *cert. denied*, 134 S.Ct. 632 (2013); *see Mann v. State*, 112 So. 3d 1158, 1162 (Fla.

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http://www.deathpenaltyinfo.org/op-ed-florida-ignores-unanimous-jury-legislation-death-penalty-cases-its-peril ("Florida is an outlier insofar as allowing capital-case juries to find aggravating circumstances and recommend a death sentence by a simple majority . . . Regardless of . . . one's views on capital punishment, maintaining the status quo and thereby Florida's outlier status in this country does not serve the cause of justice. States like Texas and Georgia, known for their pro-death penalty stance, require unanimous juries. So should we.").

[9] *See* DEATH PENALTY INFORMATION CENTER, *Death Sentences in the United States Since 1977 by State and by Year*, *available at* http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[10] *See* DEATH PENALTY INFORMATION CENTER, *Facts about the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

2013).

B. *The Florida Capital Sentencing System Violates the Sixth Amendment Right to Jury Decision-making Recognized in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed. 556 (2002), a Situation the Supreme Court of Florida has Repeatedly Failed to Correct.*

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L. Ed. 2d. 556 (2002), this Court overruled *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and held that under the Sixth Amendment any fact necessary to impose the death penalty must be proven both to a jury and beyond a reasonable doubt. *See Ring*, 536 U.S. at 589; 598-609; *see generally Jones v. U.S.*, 526 U.S. 227, 251-252 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The Supreme Court of Florida, however, which had upheld its statute prior to *Ring*, flatly refused to re-visit the issue thereafter – simply announcing that it would not change its previously-expressed views until ordered to do so by this Court. *See Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), *cert. denied,* 123 S.Ct. 662 (2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied,* 123 S.Ct. 657 (2002). The time has come for this Court to accept the invitation.

The constitutionality of Fla. Stat. § 921.141 is pending before this Court, *Hurst v. Florida,* 135 S.Ct. 1531, 191 L. Ed. 2d 558, 83 USLW 3717 (2015).

Hurst's petition for certiorari presented two questions, the second of which was:

> Whether the Supreme Court of Florida has correctly concluded that this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) (1) has no applicability to Florida's death sentencing scheme generally, (2) that specifically it does not require the jury's recommendation of death be unanimous, (3) that the jury's findings of aggravating factors need not be unanimous, (4) that the jury has no role in determining the factual issue of the defendant's mental retardation, and (5) that the lack of unanimity does not offend our evolving standards of decency as required by the Eighth Amendment?

Petition for Writ of Certiorari to the Supreme Court of Florida at i, *Hurst v. Florida*, 135 S.Ct.

1531 (2015) (No. 14-7505).

In granting the writ, this Court modified the question to be answered as follows: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L. Ed. 2d 556 (2002)." The Court may decide *Hurst* on a relatively narrow basis. In that case, it should grant certiorari in this case to address the broader constitutional flaws in the Florida capital system, and put them definitively to rest.[11]

Despite its determination that *Ring* does not apply to Florida's capital sentencing scheme, the Supreme Court of Florida has, over the years, clearly struggled with the constitutionality of a lack of juror unanimity when considering *Ring*. *See, e.g., Anderson v. State*, 841 So. 2d 390, 409 (Fla. 2003) (Pariente, J., concurring as to conviction and concurring in result only as to sentence); *Butler v. State*, 842 So. 2d 817, 835 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part); *Bottoson v. Moore*, 833 So. 2d at 709 (Anstead, C.J., concurring in result only); *Jones v. State*, 845 So. 2d 55, 75 (Fla. 2003) (Anstead, C.J., specially concurring); *Doorbal v. State*, 837 So. 2d 940, 963-964 (Fla. 2003) (Anstead, C.J., concurring in result only; Pariente, Shaw, J.J., concurring as to the conviction and concurring in result only as to the sentence).

Furthermore, in *State v. Steele*, the court stated,

> [I]n light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations.
> …

[11] *See* Brief of Amici Curiae Former Justices of the Supreme Court of Florida in Support of Petitioner, Hurst v. Florida, No. 14-7505 (U.S. filed June 4, 2015) and Brief of Amici Curiae Former Florida Circuit Court Judges in Support of Petitioner, Hurst v. Florida, No. 14-7505 (U.S. filed June 4, 2015).

> The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

921 So. 2d 538, 548-550 (Fla. 2005). Florida, in short, has recognized its outlier status but failed to correct it despite pointed warnings over many years. This Court should put the situation to rest in this case if it has not done so in *Hurst*.

Correll's jury was instructed that the "[f]inal decision as to what punishment should be imposed *resides solely* with the Judge of this Court. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant." Trial, Week Two, Volume VIII, p. 716-717. (emphasis added). Pursuant to the Florida Statute, the jury was not asked to specify which aggravating circumstances it found. *See id*. at 860-861. After deliberating for less than an hour, Correll's jury returned four non-unanimous votes recommending death. *See id*. at 861-862. After the jury was excused, the trial court indicated that it would "consider the jury recommendation" in rendering a decision. *Id*. at 867.

Correll was sentenced pursuant to a statute that does not require a unanimous sentencing recommendation and as a result, does not ensure that any one factor used to warrant imposing the death penalty is found by the jury. Thus, the Florida statute manages to undermine both the role of aggravating circumstances in assuring reliability in capital sentencing and the role of the jury in safeguarding the defendant's right to a community judgment. This either violates the Sixth Amendment and the dictates of *Ring*, as well as the Eighth Amendment and the dictates of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Correll has

consistently challenged his sentence on both grounds.

Although the list of aggravating circumstances that can justify a death sentence, found in Fla. Stat. § 921.141(5), include a finding that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Correll had not been convicted, prior to the convictions on which his death sentences rest, of any felony falling into the category defined by the statute. *See* Fla. Stat. § 921.141(5)(b). The Supreme Court of Florida has interpreted this provision to include convictions for contemporaneous crimes. *See, e.g., Correll*, 523 So. 2d at 568. However, that same court has stated that the purpose for considering prior violent felony convictions is to engage in a "character analysis" to ascertain whether the defendant exhibits a propensity to commit violent crimes. *See Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977). Correll presented evidence during his penalty phase proceedings that just the opposite was true. Furthermore, any argument that the statutory aggravator set forth in Fla. Stat. § 921.141(5)(d) necessarily applies is refuted by the fact that Correll was never charged with or found guilty of any of the crimes set forth in that subsection. Moreover, even if one of the statutory aggravators necessarily applied, a jury can recommend a sentence of life despite the existence of an aggravator. The finding that sufficient mitigation *does not exist to outweigh the aggravating factors* is yet another fact that is necessary to impose the death penalty under Florida's statute. *See* Fla. Stat. § 921.141(2)(b) ("After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon . . . [w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist").

In a capital sentencing, it is important that a jury "express the conscience of the community on the ultimate question of life or death." *Lowenfeld v. Phelps*, 484 U.S. 231, 238, 108 S.Ct. 546,

98 L.Ed. 2d 568 (1988) (*quoting Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed. 2d 776 (1968)). The Court has also held that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases, this requirement of unanimity extends to all issues -- character or degree of the crime, guilt and punishment -- which are left to the jury. . . . the jury's decision upon both guilt and whether punishment of death should be imposed must be unanimous." *Andres v. United States*, 333 U.S. 740, 748-49, 68 S.Ct. 880, 884, 92 L.Ed. 1055 (1948). Further, the Court has stated that there are "size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained." *Brown v. Louisiana*, 447 U.S. 323, 330-31, 100 S.Ct. 2214, 2221, 65 L.Ed. 2d 159 (1980).

Ring was based on a capital defendant's right to have all facts necessary to impose the death sentence determined by a jury because the safeguard of jury fact-finding is at its zenith in capital cases. Yet in Florida the capital jury is peripheral to decision-making under the statute. Thus, defendants are subject to a system that is both unconstitutionally arbitrary under the Eighth Amendment and unconstitutionally unreliable under the Sixth Amendment.

ISSUE II

THE TOTALITY OF THE PUNISHMENT THE STATE HAS IMPOSED ON CORRELL VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PRECEPTS OF *LACKEY V. TEXAS*, 514 U.S. 1045, 115 S .Ct. 1421, 131 L.Ed. 2d 304 (1995).

Correll argued in his third successive motion for post-conviction relief that the length of time he has spent on death row constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Appendix KK*. The Supreme Court of Florida affirmed the circuit court's denial of relief on this claim, citing to previous opinions in which it

denied such challenges, and pointing out that "executions of inmates who have been on death row as long as, or longer than, Correll have been permitted." *Correll*, 2015 WL 5771838 at *6; *Appendix A*.

Correll's incarceration on death row began on February 8, 1986, when he was thirty years old. On October 29, 2015, the date of his scheduled execution, he will be 59 years old, and he will have spent over 29 years on Florida's death row. Correll is not the same man today that he was when he arrived on death row. Like Correll, the average inmate on Florida's death row spends many years awaiting execution, not knowing if, or when, his sentence will ultimately be carried out. As of December 31, 2013, prisoners on Florida's death row spent an average of 15 years awaiting execution. *See* U.S. Department of Justice Bureau of Justice Statistics, *Capital Punishment, 2013- Statistical Tables* at Table 15 (revised December 19, 2014), *available at* http://www.bjs.gov/content/pub/pdf/cp13st.pdf. In fact, in 2013 just as many death row inmates in Florida died from other causes as were executed (seven each). *Id.* at Table 9. The last ten inmates executed in Florida spent an average of almost 25 years on death row before execution. *Glossip*, 135 S.Ct. at 2764 (Breyer, J., dissenting).

The length of time spent on death row is made worse by the fact that Florida's death row is not intended for long-term residency:

> . . . [P]risoners who have been sentenced to death are maintained in a six-by nine-foot cell with a ceiling nine and one-half feet high. These prisoners are taken to the exercise yard for two-hour intervals twice a week. Otherwise, these prisoners are in their cells except for medical reasons, legal or media interviews, or to see visitors (allowed access to visit from 9 a.m. to 3 p.m. on weekends only). These facilities and procedures were not designed and should not be used to maintain prisoners for years and years.

Swafford v. State, 679 So. 2d 736, 744 n. 8 (Fla. 1996) (Wells, J., concurring in part and dissenting

in part) (citations omitted).

The State of Florida has added to Correll's death sentence the morbid additional sentence of being taunted with death for nearly three decades, almost half of Correll's life, in inhumane conditions, not knowing if or when a death warrant would ever be signed. This additional sentence constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution, as it is a greater punishment than that to which Correll has been sentenced and that which the Eighth Amendment condones.

In *Lackey*, Justice Stevens observed:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, *see id.*, at 177, 96 S.Ct., at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id. at 183.*
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death.

Lackey, 514 U.S. 1045.

Lengthy delays in the execution of death sentences deprive the death penalty of any deterrent or retributive effect it might once have had. *Lackey*, 514 U.S. 1045; *Glossip*, 135 S.Ct. at 2765, 2767-70. (Breyer, J., dissenting). When punishment incident to the death penalty eclipses the death penalty itself in penological effect, the death penalty becomes "the pointless and needless extinction of life with only marginal contributions to any discernable social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312 (White, J., concurring).

Correll's imprisonment on death row for 29 years, during which time he endured unnecessary and gratuitous pain in the form of intense psychological suffering exceeds the sentences of death that were imposed on him in 1986 and constitutes cruel and unusual punishment under the Eighth Amendment. That is particularly so since some significant part of the delay seems to have been due to a breakdown in the judicial machinery. *See supra* page 6. Thus, if it does not invalidate Correll's sentence outright, the Court should order an evidentiary hearing on the causes, nature, and effects of the extraordinary delays in this case.

CONCLUSION

For the foregoing reasons, Correll respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Supreme Court of Florida.

Respectfully submitted,

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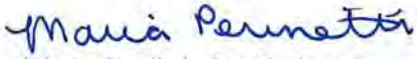

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