IN THE
Supreme Court of Florida

TIMOTHY LEE HURST,
Appellant,
v. Case No. SC12-1947

STATE OF FLORIDA,
Appellee.

THOMAS BEVEL,
Appellant, Case No. SC14-770
v.

STATE OF FLORIDA,
Appellee.

TERENCE OLIVER,
Appellant,
v. Case No. SC12-1350

STATE OF FLORIDA,
Appellee.

AMENDED BRIEF OF AMICI CURIAE JUSTICE HARRY LEE ANSTEAD, JUDGE ROSEMARY BARKETT, MARTHA BARNETT, TALBOT D'ALEMBERTE, HANK COXE, JUSTICE GERALD KOGAN, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FLORIDA CAPITAL RESOURCE CENTER, AND FLORIDA CENTER FOR CAPITAL REPRESENTATION, ON BEHALF OF APPELLANTS

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STATEMENT OF IDENTITIES AND INTERESTS OF AMICI CURIAE

Amici Curiae are individuals and organizations. The individuals have held the following relevant positions, among others: justices and chief Justices of the Supreme Court of Florida, judge on the United States Court of Appeals for the Eleventh Circuit, Florida Bar president, American Bar Association presidents, Florida State University president, member of the Florida House of Representatives, chairs of the Florida Constitution Revision Commission, chairs of the Florida Commission on Ethics, chief prosecutor of the Homicide and Capital Crimes Division of the Miami-Dade State Attorney's office, and director of the Felony and Special Prosecution Divisions of the Fourth Judicial Circuit's State Attorney's Office. All *amici,* their qualifications, and their interests in this cause are identified below.

Individuals

The Honorable Harry Lee Anstead was a trial and appellate attorney until 1977, when he joined the Fourth District Court of Appeal, for which he served as chief judge. In 2002, Governor Lawton Chiles appointed then-Judge Anstead to the Florida Supreme Court, on which he subsequently became Florida's 50th chief justice. Justice Anstead retired from the Court in 2009.

Martha Barnett is a retired senior partner in the law firm of Holland & Knight. Her primary areas of practice were administrative, governmental law, and public

policy. Ms. Barnett served as chair of the Florida Commission on Ethics (1986-1987), and of the Florida Constitution Revision Commission (1997-1998), and was a member of the Florida Taxation & Budget Reform Commission (1990-1994) and (2007-2008).

An attorney involved in public service nationwide, Ms. Barnett served as president of the American Bar Association (2000-01), chairwoman of the ABA's House of Delegates (the first woman to serve in this position), and president of the American Endowment (2014-15).

The Honorable Rosemary Barkett was appointed to the Fifteenth Judicial Circuit Court by Governor Bob Graham in 1979, and to the Fourth District Court of Appeal by Governor Graham in 1984. In 1985, Justice Barkett became the first woman appointed to the Florida Supreme Court, and she later became the first female chief justice of the Court. In 1994, Justice Barkett was named to the United States Court of Appeals for the Eleventh Circuit, where she served until 2013, when she joined the Iran-United States Claims Tribunal, on which she currently serves.

Judge Barkett has served on the faculty of Florida's Judicial College, the National Judicial College, and the Institute of Judicial Administration's New Appellate Judges Seminar.

Henry Coxe is a partner in the Bedell Law Firm in Jacksonville, at which he specializes in criminal defense work in federal and state courts. He served as

president of the Florida Bar from 2006-07, and was a member of the Board of Governors from 1997-2007. He has served in various capacities to assist this Court, including as a member of the Florida Supreme Court Innocence Commission, the Court's Criminal Steering Committee, and the Court's Judicial Qualifications Commission. Mr. Coxe is a former prosecutor in the Fourth Judicial Circuit's State Attorney's Office, for which he served as the director of the Felony Division and the Special Prosecution Division.

Talbot "Sandy" D'Alemberte served as president of Florida State University from 1994-2003, and Dean of its College of Law from 1984-1989. He was a member of Florida's House of Representatives from 1966-1972. As a representative from Dade County, President D'Alemberte chaired the Judiciary Committee, which drafted and passed a major judicial reform constitutional amendment in 1972. He was named Most Outstanding Member of the House that year.

After leaving the House, President D'Alemberte chaired the Florida Commission on Ethics (1974-75), and the Florida Constitution Revision Commission (1977-78). He served as President of the American Bar Association from 1991-92. President D'Alemberte currently is a Professor of Law at FSU and a partner in D'Alemberte & Palmer, at which he practices appellate work.

The Honorable Gerald Kogan was the chief prosecutor of the Homicide and Capital Crimes Division of the Miami-Dade State Attorney's Office. In 1980,

Justice Kogan was appointed to the Eleventh Judicial Circuit Court, and in 1984, he was appointed administrative judge of that court's criminal division. Justice Kogan was appointed to the Florida Supreme Court in 1987, where he served as Chief Justice from 1996 until his retirement from the Court in 1998.

Organizations

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization representing over 2,000 members, all of whom are criminal defense practitioners. FACDL is a nonprofit corporation whose goal is to assist in the reasoned development of Florida's criminal justice system. Its founding purposes are: promoting study and research in criminal law and related disciplines, ensuring the fair administration of criminal justice in the Florida courts, fostering and maintaining the independence and expertise of criminal defense lawyers, and furthering the education of the criminal defense community.

Florida Capital Resource Center (FCCR) is a nonprofit organization whose mission is to protect the constitutional rights of Florida capital defendants by assisting counsel in providing effective representation. FCRC provides free consultations, research, training, advocacy, and other resources to capital defendants and their counsel.

Florida Center for Capital Representation (FCCR) at Florida International University College of Law was founded in 2014 to support defense attorneys

representing defendants facing the death penalty in Florida. To that end, FCCR provides free case consultation and litigation-support services, as well as capital-litigation training programs to defense attorneys and mitigation specialists across the State. With a strong emphasis on developing mitigation to obtain death-penalty waivers and pleas, FCCR seeks to train and assist capital-defense teams in resolving cases short of a death sentence.

Interest of *Amici*

The issue before the Court concerns the ramifications for death-sentenced defendants emanating from the Supreme Court's decision in *Hurst v. Florida.* Amici, as academics, attorneys, resource counsel, and a sitting Judge on the Iran – United States Claims Tribunal, who devote or have devoted much of their time and efforts to safeguarding the constitutional rights of capital defendants, believe that we have particular interest and expertise in the question before the Court as to the appropriate remedy following *Hurst v. Florida.*

SUMMARY OF THE ARGUMENT

Hurst v. Florida held Florida's death penalty statute unconstitutional. Section 775.082(2) of the Florida Statutes requires that, in the event the death penalty in a capital felony is held unconstitutional by this Court or the Supreme Court of the United States, the person who has been previously sentenced to death must be re-sentenced to life imprisonment. The statute uses the mandatory directive "shall" and suffers no ambiguity.

Relying on only the plain terms of the statute, which this Court's rules of statutory construction mandate, the legislative intent is manifest. The statute contains no qualifying or limiting terms as to the ground(s) or breadth of unconstitutionality required to invoke it, nor the number of individuals on death row who stand to benefit from the remedy. Statutory exceptions are to be narrowly construed, and the one exception, added years after the statute's enactment, precludes the provisions application in the event that Florida's *method* of execution is held unconstitutional, not the death-penalty sentencing procedure. Reading the statute as a whole, it is patent that the first (original) sentence establishes the general rule that governs here, while the second (the amendment) permits but one exception.

The consequence of applying the statute as written is in keeping with what the 1972 Legislature—and all those since—have long set forth as Florida policy, and with this Court's practice even before the statute's effective date. When *Furman v.*

Georgia held that three, non-Florida death sentences were unconstitutional, this Court ordered that 100 death-sentenced Florida defendants have their sentences reduced to life imprisonment. The Court held that that sentence was the maximum that could be imposed on others in the pre-trial stage, thus affording swift, efficient, equal, and fair application.

Of course, if the result compelled by the plain language of the statute could be viewed as "absurd," the Court would then look to the statute's legislative history to divine legislative intent. That history only buttresses what the plain language directs. A year after the Court's sweeping reduction of sentences for death row inmates and presentencing capital defendants, the Legislature eliminated the provision of section 775.082 that provided the same remedy to defendants who had been convicted or charged capitally, but had not yet been sentenced, leaving the statute applicable solely to those on death row, post-sentencing. In doing so, lawmakers had the opportunity to eliminate subsection (2) in the wake of this Court's sweeping grant of relief, and it declined to do so, except as to the class of capital defendants who had not yet been sentenced to death.

The Legislature provided an exception to the statute again in 1998, when the constitutionality of Florida's method of execution was before this Court for consideration. Rather than eliminating the mandate that unconstitutional death sentences be reduced to life without parole, the Legislature again chose simply to

circumscribe the breadth of the remedy, by providing that the statute was not to apply if the method of execution were invalidated, just if a death sentence itself were held unconstitutional.

Thus, as to death row inmates, the Legislature has maintained essentially the identical statute, with the same plain language and underlying intent, that it enacted shortly after certiorari was granted by the Supreme Court in *Furman.* Thus, before the decision in *Furman*, after the decision in *Furman*, before this Court's mass commutation, as well as long after, the Legislature has consistently made clear that where a death sentence (or in this case, the death penalty sentencing statute, and therefore all death sentences) is held unconstitutional, the trial court with jurisdiction over the case *must* resentence the death row inmate to life in prison. That not only remains the case after *Hurst v. Florida,* but the statute's application is far more clear now than it was following the United States Supreme Court's decision in *Furman,* in which no Florida death sentences were under review.

The final statutory directive, the rule of lenity codified in the Florida statutes, dictates that criminal statutes must be strictly construed. Any question or ambiguity, if such could be identified, must be resolved in favor of the criminal defendant.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Because the United States Supreme Court held Florida's death penalty unconstitutional in *Hurst v. Florida,* section 775.082(2) of the Florida statutes requires that all persons previously sentenced

to death for a capital felony be resentenced to life imprisonment without the possibility of parole.

On January 12, 2016, the Supreme Court of the United States held that Florida's capital sentencing scheme violates the Sixth Amendment to the United States Constitution. *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Court stated:

> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.
>
> * * *
>
> Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Id. at 619, 624.

This Court is now grappling with who is affected by *the Hurst* decision and what form of relief should be granted. Amici Curiae believe that the resolution is conclusively provided by a straightforward application of statutory-construction guidelines to Florida's criminal sentencing statute, section 775.082(2), of the Florida Statutes. This provision provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

Based on a plain-language reading of this statute, persons previously sentenced to death for a capital felony prior to the decision in *Hurst v. Florida*, are entitled to have their death sentences replaced by sentences of life without parole.

A. Basic rules of statutory construction require that this Court apply the unambiguous, plain language of section 775.082(2).

This Court repeatedly has mandated that the judicial examination of a statute begin with its plain language. *See Alachua Cty. v. Expedia, Inc.,* 175 So. 3d 730, 733 (Fla. 2015); *Diamond Aircraft Indus. Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013); *J.M. v. Gargett*, 101 So. 3d 352, 356 (Fla. 2012). Under this approach, when a statute's text is clear and "conveys a clear and definite meaning, that meaning controls." *Gargett*, 101 So. 3d at 356. This method offers the best means to ascertain and give effect to the legislature's intent in enacting the statute, which serves as the "polestar," as this Court has often described it, of statutory interpretation. *See Raymond James Fin. Servs, Inc.*, *v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) (citation omitted); *Hill v. Davis*, 70 So. 3d 572, 575 (Fla. 2011) (a statute's text is the "most reliable and authoritative expression" of the legislature's intent.).

By beginning statutory interpretation with a search for plain meaning, the Court has recognized its own, limited constitutional role: When the text speaks clearly and without ambiguity, the judiciary's proper role is simply to apply it. *Gomez v. Vill. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010); *Velez v. Miami–Dade County Police Dep't*, 934 So.2d 1162, 1164-65 (Fla. 2006) ("We are without power

to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."). Indeed, even when the court believes the Legislature intended a meaning different from that expressed in the plain language of a statute, the Court "will not deem itself authorized to depart from the plain meaning of the [statutory] language which is free from ambiguity." *State v. Ruiz*, 863 So. 2d 1205, 1209 (Fla. 2003). In short, this Court, in applying section 775.082(2), should begin and end its interpretation with the statute's plain, unambiguous meaning.

B. Section 775.082(2) unambiguously requires that all capital felons whose death sentences have been imposed under the now-unconstitutional statute be resentenced to life in prison.

The plain language contained in the first sentence of section 775.082(2) could not offer a clearer command: Upon the condition precedent that the death penalty in a capital felony is held unconstitutional by this Court or the United States Supreme Court, the court having original jurisdiction over the case "shall" resentence the defendant to life imprisonment. The statute gives the trial court *no* discretion, as "shall" is presumptively mandatory. *See Grip Dev. Inc. v. Caldwell Banker Residential Real Estate, Inc.*, 788 So. 2d 262, 265 (Fla. 4th DCA 2000); *Stanford v. State*, 706 So. 2d 900, 902 (Fla. 1st DCA 1998).

The Supreme Court in *Hurst* held the Florida death penalty scheme unconstitutional. *Hurst*, 136 S. Ct. at 619 ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."). Thus, the condition precedent of the statute is satisfied and the circuit courts having jurisdiction shall vacate Appellants' death sentences and impose sentences of life without parole. *See* § 775.082(2), Fla. Stat.

This remedy is also dictated by the lack of any qualifying or limiting language in the statute. Had the Legislature intended to limit the automatic and obligatory reduction of death sentences to life imprisonment to decisions holding that the death penalty is unconstitutional across the board, or to Eighth Amendment violations rather than to violations under the United States and/or Florida constitutions *in toto,* the Legislature could have enumerated such limitations; but it did not. This is underscored by the fact that, in 1998, many years after the statute was enacted, the legislature *did* preclude the replacement of a death sentence with a life sentence, but only based on a determination that the method of execution was held unconstitutional. *See* § 775.082(2), Fla. Stat. (1998); App. at 11, 33 (amending statute to add: "No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States."). *See also* Section E, *infra.*

Exceptions in statutes are "narrowly and strictly construed." *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100-01 (Fla. 1990). And the "doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *Fla. Dep't of State, Div. of Elections v. Martin,* 916 So. 2d 763, 768 (Fla. 2005). Construing together the two sentences, then, the first sentence establishes the general rule, with the second establishing the one exception. As enacted, the section's first sentence—whether read in isolation or in *pari materia* with the second sentence—plainly commands this Court to reduce to a life sentence any death sentence imposed under the statute held unconstitutional by *Hurst v. Florida.*

The fact that a specific statute so specifically provides the remedy for persons previously sentenced to death under the unconstitutional statute distinguishes this case from the vacuum in legislative remedies with which the Court was confronted last year in the juvenile-sentencing context. *See Horsley v. State*, 160 So. 3d 393 (Fla. 2015). There, the Court acknowledged the limitations imposed by the separation of powers, in explaining why it could not create its own sentencing remedy:

> [W]e could fashion our own remedy, . . . based solely on the requirements established by the United States Supreme Court in *Miller.* Although this option would satisfy our duty to give effect to the pronouncements of the United States Supreme Court, it would also

> require us to ignore the primary role of the Legislature in criminal sentencing by crafting a remedy without a statutory basis. Therefore, we conclude that this remedy is inconsistent with our respect for the separation of powers.

Id. at 405.

The Court chose to apply the newly enacted juvenile-sentencing statute as the alternative most consistent with legislative intent. And the Court must do the same thing here, with the distinction that there is no void to fill or reason to search for what might be the best choice for effecting legislative intent. There is a long-standing statute that precisely governs. The plain language of section 775.082(2) dictates the only alternative consistent with "respect for the separation of powers." *Id.*

C. Because the unambiguous plain language of section 775.082(2) produces a reasonable, non-absurd result, the Court need not consider the statute's legislative history, under its rules of statutory construction.

Given the clarity of section 775.082(2), the only context in which this Court could consider its legislative history is if the statute's plain terms would produce an absurd result. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) (citation omitted). *See also Knowles v. Beverly Enterprises—Florida, Inc.*, 898 So. 2d 1 (Fla. 2004) ("[B]ecause the language of the statute is clear and unambiguous, the analysis must end there.").

But the remedy drawn by the Legislature, as limited in 1998 to sentences rather than methods of execution, *see* App. at 11, 33, was and is eminently reasonable. While the constitutional invalidation of a method of execution does not call into question the validity of the underlying death sentence, a conclusion that the process used to impose that death sentence is unconstitutional, does so inescapably. *Cf. Austin v. State ex rel. Christian,* 310 So. 2d 289, 292 (Fla. 1975) (any doubts about the scope of a statute may be resolved by consideration of such factors as convenience, sound public policy, or the "due administration of justice").

To be sure, subsection (2)'s first sentence has widespread implications. But as Justice Scalia put it in his concurrence in *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993), "The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it." Moreover, this is not the first time that this Court has faced such a sweeping outcome following the invalidation of the death penalty, and it would not be the first time that the Court has determined that a life sentence (or term of years) must be imposed on every individual on death row. *See In re Baker*, 267 So. 2d 331, 335 (Fla. 1972) (considering the application of 60 death-sentenced defendants and holding that after *Furman v. Georgia*, 408 U.S. 238 (1972), "it is clearly to the best interest of the public that this Court impose [life] sentences upon. . . all of the . . . persons under penalty of death who have been convicted of [capital] murder[.]"; *Anderson v. State,*

267 So. 2d 8 (Fla. 1972) (holding that death sentences of 40 defendants pending on appeal must be vacated following *Furman* and imposing life sentences rather than remanding to the circuit courts for consideration under Rule 3.800, based on the lack of discretion regarding what sentence to impose and the public policy concerns that justified the Court's exercise of jurisdiction to resentence the appellants).

In short, this Court has previously dealt with the remedy question which devolves from the Supreme Court's holding that the death-penalty process is unconstitutional, and did not hold then that the remedy set forth in sections 775.082(2) and (3) was "absurd." Quite the contrary—the Court reasoned that the proper course was not a piecemeal, case-by-case review, but rather, to reduce to life imprisonment the death sentences unconstitutionally imposed. This is indeed the remedy that the Legislature long and consistently has mandated by enactment and re-adoptions of section 775.082(2). The remedy has no cap on its application, nor could it and still remain constitutional. Thus, by passing, amending, and maintaining the statute, even *after* this Court commuted all death sentences to life imprisonment following *Furman,* the Legislature has demonstrated its view that such result is not absurd.[1]

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[1] *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, __ U.S. __, 127 S. Ct. 1534, 1559 (2007) (Scalia, J., dissenting) ("The only sure indication of what Congress intended is what Congress enacted . . . . We must interpret the law as Congress has written it, not as we would wish it to be.").

D. The legislative history of section 775.082 also supports the remedy required by the statute's plain language.

While the plain language of an unambiguous statute provides the first and only basis of inquiry as to its scope, the legislative history of section 775.082(2) only buttresses its unequivocal language.

1. This Court previously has interpreted section 775.082(2)'s legislative intent as requiring the imposition of life sentences even in the absence of a categorical ban on the death penalty.

(a) *Senate Bill 153*

Senate Bill 153, enacting section 775.082(2) and (3), was pre-filed in August, 1971, just after the Supreme Court granted certiorari in *Furman*. *See Furman v. Georgia*, 403 U.S. 952 (1972) (granting certiorari June 28, 1971). The provisions provided as follows:

> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, **a person who has been convicted of a capital felony** shall be punished by life imprisonment.
>
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over **a person previously sentenced to death for a capital felony** shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

(App. at 1-2) (emphasis added). The preamble to the bill described these provisions as "providing that if the courts declare the death penalty unconstitutional, then those

persons to be sentenced or those previously sentenced to death should be sentenced to life without parole." (App. at 1.)

The timing of SB 153 may suggest to some that it was intended solely to provide a reasonable remedy should the United States Supreme Court hold in *Furman* that the death penalty was *per se* unconstitutional under the Eighth Amendment—*i.e.*, that sections 775.082(2) and (3) were never intended to apply in perpetuity, nor, indeed, if anything *less* than a categorical ban was imposed by the *Furman* Court. Not only does the plain language of the statute belie such interpretation,[2] but this Court's decisions in the wake of *Furman*, and subsequent amendments to the statute, make clear that such suggestion bears no relationship to the actual legislative intent behind the bill.

First, *Furman* did not "declare the death penalty unconstitutional" (quoting Preamble to SB 153 (1971)), nor was the systemic application of the death penalty even explicitly before the Court when it granted certiorari in *Furman. Furman,* 408 U.S. at 239 ("Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty *in (these cases*) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?'")

[2] Section 775.082(2) provides that life without parole shall be applied by the trial court if a "death sentence" is held unconstitutional, not "the death penalty." Moreover, the statute does not limit the remedy to an Eighth Amendment violation. 775.082(2), Fla. Stat. (1972).

(quoting 403 U.S. 952 (1971)) (emphasis added). Rather, the five justices who joined the one-paragraph majority opinion agreed only that the three death sentences from Georgia and Texas before the Court violated the Eighth Amendment.[3]

Second, this Court also never explicitly held the "death penalty" unconstitutional, even after *Furman. See Baker*, 267 So. 2d at 331 ("This Court has itself never declared the death penalty unconstitutional, but has recognized and followed the decision of the United States Supreme Court in *Furman v. Georgia, [s]upra*.") (citing *Donaldson v. Sack*, 265 So. 2d 499 (1972), and *Anderson*, 267 So. 2d 8); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) ("Capital punishment is not, [p]er se, violative of the Constitution of the United States (*Furman v. Georgia*, *supra*) or of Florida. *Wilson v. State*, 225 So.2d 321 (Fla. 1969).").

Nonetheless, the Court "had no difficulty" holding that defendants indicted for a "former" capital offense should automatically be sentenced to life in prison

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[3] The majority holding in *Furman* was as follows:

> The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (reversing three death sentences). Each of the five justices in the majority wrote separately to explain his reasoning for the result; thus, the majority holding consists solely of the above paragraph.

upon conviction, *id.* at 501, and that the same was the case for defendants who had already been sentenced to death, *Anderson,* 267 So. 2d 8. Notably, in reaching this conclusion, the Court gave

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

Donaldson, 265 So. 2d at 505 (emphasis added). *See also id.* at 502 (noting that such result was not only proper under the severability doctrine, but consistent with the Legislature's "express intent" as demonstrated in section 775.082(2), which was to become effective less than three months later) (*quoting* Chapt. 72-118, Laws of Fla. (1972)).

The effect, then, of *Furman*'s reversal of just three death sentences was a swift, fair, and across-the-board remedy employed even before the statute that commanded it was operative. Months after *Furman,* Chapter 72-118 inexorably went into effect without interruption and the first half of section 775.082(2) (originally numbered section 775.082(3)), has remained unchanged for decades. Thus, any suggestion that it applies, or was meant to apply, solely to the particular circumstances posed by *Furman,* or when this Court or the Supreme Court

categorically bans the death penalty—nationwide or in Florida—is incorrect based on this Court's own interpretation of the statute's legislative intent.

(b) *The legislative history of section 775.082(2) only buttresses the statute's plain language, and this Court's previous construction thereof.*

In 1974, the Legislature revoked subsection (2), substituting the language from subsection (3) in its place. Chapt. 74-383, s. 5, Laws of Fla. (1974); App. at 11. Because the Legislature revoked the remedy of life without parole as to one class of offenders (capital defendants pending sentencing), but not with regard to the other (defendants already sentenced to death), it necessarily deliberated upon the scope of the statute. And subsection (2) remained intentionally on the books after *Furman*.

Perhaps most compelling, the Legislature revisited section 775.082(2) *again*, in 1998, when doubts arose about the constitutionality of Florida's method of execution. House Bill 3033 proposed adding the following after the first and only sentence previously in subsection (2): "No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States." § 775.082(2), Fla. Stat. (1998); *see also* App. at 31-3.

The House of Representatives' Committee on Crime and Punishment noted that the limitation was proposed to avoid what Justice Harding previously described as a "'constitutional train wreck' with all the people on Death Row having their

sentences commuted to life unless an alternative to electrocution is passed by the legislature." CS/HB 3033, Bill Res. & Econ. Impact Stat., at 2 (Feb. 4, 1998) (citing *Anderson,* 267 So. 2d 8; *Furman,* 408 U.S. 238)); App. at 36-7.

Thus, the Legislature was aware of the statute and considered its terms. The Legislature, then, chose to make one exception to the mandate that when a death sentence is held unconstitutional, the trial court of jurisdiction must impose a sentence of life imprisonment on the death row inmate. That lone exception is where the unconstitutionality of the death sentence is premised on the execution method. The rest of the statute, the general rule for all other holdings of "death-penalty" unconstitutionality, remained, and still remains, untouched.

In short, the 1974 and 1998 amendments to section 775.082(2) demonstrate that the Legislature meant what it said in 1972. The statute is not ambiguous, nor is the result urged herein absurd. But should the Court find it necessary to examine the legislative history to determine the legislature's intent, it will find only support of the plain language.

(c) *Immediately following Ring, the Colorado and Missouri supreme courts applied the same remedy sought by Appellants under statutes virtually identical to section 775.082(2).*

In applying the remedy mandated by section 775.082(2), this Court would be in line not only with its own precedent, but that of other states with virtually identical statutes. Following the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584

(2002), the Supreme Court of Missouri held its death-sentencing statute unconstitutional under the Sixth Amendment. *State v. Whitfield*, 107 S.W. 3d 253, 264 (Mo. 2003). After holding *Ring* retroactive and rejecting the assertion that the constitutional error could be harmless without evidence of what the jury found, *id.* at 262-69, the Court refused the state's request to remand for a new sentencing hearing. *Id.* at 269-72. Turning to a 1984 statute substantially identical to section 775.082(2), the Court noted that the remedy "anticipated" and "required" by the Legislature was to vacate the appellant's death sentence and impose a life sentence:

> Because the imposition of Mr. Whitfield's death sentence has been determined to be in violation of his right under the Sixth and Fourteenth Amendments to a jury determination of the facts rendering him eligible for death, section 565.040.2 clearly applies.

Id. at 271. Like Florida's statute, the Missouri statute "expressly states that a defendant whose sentence is vacated on constitutional grounds shall be resentenced to life in prison." *Id.* Similarly, its application is not limited to systemic, death-penalty proscriptions under the Eighth Amendment:

> [The statute] does not . . . state that a defendant shall be sentenced to life imprisonment only if his death sentence is held unconstitutional on the basis that the defendant was never really eligible for the death penalty in the first place, such as defendants who are mentally retarded or as to whom no aggravator applies, and that defendants whose sentences are overturned on procedural grounds shall receive new trials. Rather, it states that "[i]n the event that *a death sentence imposed pursuant to this chapter is held to be unconstitutional*, the trial court . . . shall sentence the defendant to life imprisonment.

Id. (emphasis, brackets and second ellipses in original). The court subsequently

confirmed that the remedy of life imprisonment would not be required for "some unrelated trial error," but was mandated in *Whitfield* because of exactly the same defect at issue in Florida: the "'entry of a judgment of death based on the judge's findings' in violation of *Ring*, which made the death sentence itself unconstitutional." *State v. Deck*, 303 S.W. 3d 527, 534 (Mo. 2010) (*en banc*) (quoting *Whitfield*, 107 S.W. 3d at 270 n.20).

The Supreme Court of Colorado employed the identical remedy in *Ring*'s aftermath based on the legislative directive of a similar statute. Rejecting the argument that a discretionary statute enacted in 2002 *permitting* a remand for a new sentencing should govern, the Court applied the long-standing mandatory statute that required resentencing to life imprisonment "[i]n the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court of the United States supreme court. . . ." *Woldt v. People of Colorado*, 64 P. 3d 256, 267 (Colo. 2003).[4] Life sentences were required.

E. The rule of lenity also requires resentencing to life imprisonment without any opportunity for parole.

If any doubt could remain about the intended application of §775.082(2), the "Rule of Lenity" dictates that the statute be construed in the manner most favorable

[4] By contrast, the Arizona Supreme Court declined to follow *Woldt* on the basis that the Colorado court had not examined severability of its death sentencing statute. *State v. Pandeli*, 161 P. 3d 557, 574 (2007).

to the capital defendant. *See*, *e.g.*, *Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977). This statutory-construction tool has long been codified in the Florida Statutes, providing: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1983).

This Court has not hesitated to apply this mandate when necessary to avoid what would otherwise amount to judicial lawmaking. *See Perkins v. State*, 576 So. 2d at 1312 ("Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute."); *accord Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (recognizing that the lenity rule "is not just an interpretive tool but a statutory directive."); *Lamont v. State*, 610 So. 2d 435, 437-38 (Fla. 1992).

Section 775.082(2) is neither vague nor ambiguous. The first sentence of the statute is clear in its mandate. But if there could be any ambiguity, it must be resolved in favor of the capital defendant.

CONCLUSION

Based upon the plain and unambiguous language of section 775.082(2), its legislative history, and/or the rule of lenity, this Court must order the vacatur of the death sentences imposed in the cases at bar and remand them to the circuit courts to resentence each defendant to life imprisonment without the possibility of parole.

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CERTIFICATE OF SERVICE

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Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation.

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