IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA
Plaintiff,

CASE NO: 23-CF-2935

Vs.

TOMASZ KOSOWSKI,
Defendant.
_____/

MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY

Defendant, TOMASZ KOSOWSKI, by and through undersigned counsel, moves this Honorable Court to enter its Order precluding death as a possible punishment in the instant case for the reasons set forth below:

FACTS

1. Defendant TOMASZ KOSOWSKI has been indicted in the instant case for First Degree Murder in 2023.

2. On May 30, 2023, an arraignment was conducted.

3. On April 28, 2023, the State filed a Notice of Intent to Seek Death Penalty.

4. In response to the recent United State Supreme Court decision in *Hurst v. Florida* and subsequent Florida Supreme Court ruling, the legislature enacted a new death penalty statute, effective March 15, 2017.

The Retroactive Application of a Death Penalty Statute Enacted in 2016 or 2017, Violates Article X, Section 9 of the Florida Constitution.

The potential retroactive application of criminal laws that have been amended or repealed is controlled by both the prohibition against *ex post facto* law, as well as by the separate but related protections under Art. X. s.9, Fla. Const. *Norman v. State*, 826 So. 2d 440, 442 (Fla. 2d DCA 2002) (We ground our decision on Art. X. s.9, without reaching the separate ex post facto issue.); *Bates v.*
State, 760 So. 2d 6, 10 (Fla. 1999). Article X., section 9, provides: "Repeal of Criminal Statutes. – Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." The Florida Supreme Court has held that, in analyzing changes to statutory law, a key determining factor is whether the change is procedural/remedial or substantive. *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007). Remedial statutes or statutes relating to modes of procedure, which do not create new rights or take away vested rights, but rather, operate only in furtherance of the remedy or confirmation of rights already existing, do

not come within the general rule prohibiting the retrospective operations of statutes. *Id.* A statute that achieves a remedial purpose by creating substantive new rights or imposing new [redacted] burdens is treated as a substantive change in the law. *Id*. Substantive law is that which declares what acts are crimes and prescribes the punishment therefor. *State v. Garcia*, 220 So.2d 236, 238 (Fla. 1969).

In the instant case, Mr. Figueroa-Sanabria is charged with an alleged offense that predates 2016-13, Laws of Fla., which amended and reenacted sections 775.082(1)(a), 782.04(1)(b), and 921.141. This 2016 Act effectuated substantive changes in laws and/or effectuated changes required to be treated as substantive changes. The United States Supreme Court in *Hurst v. Florida*, --- U.S .---, 136 S.Ct. 616 (2016), held that the Florida capital sentencing scheme violated the Sixth Amendment right to a jury trial because it called for an advisory jury to make a recommendation to a judge and for the judge to then makes the critical findings needed to support the imposition of a sentence of death 136 S.Ct. at 622. In response, the Legislature enacted ch. 2016-13, Laws of Fla. As set forth below, that act was a substantive change of law.

In *Smiley*, the Supreme Court stated a statute that achieves a remedial purpose by creating substantive new rights or imposing new legal burdens is to be treated as a substantive change in law. *Smiley*, 966 So. 2d at 334. The 2016 Act mandated that, if the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the Court within 45 days after arraignment. That notice must contain a list of aggravating factors the state intends to prove. The Court may allow the prosecutor to amend the notice upon a showing of good cause. Prior the 2016 Act, such notice was not required. *See Perry v. State*, 210 So.3d 630, 636 (Fla. 2016) (”Though not required by the United States Supreme Court's decision in *Hurst v. Florida*, by providing notice of aggravating factors, this change in section 2 provides a benefit to capital
defendants that they were not previously afforded.) In requiring the notice to be provided, the Legislature thus placed a new legal burden upon the State in cases in which the death penalty will be sought.

In addition to “imposing a new legal burden,” the 2016 Act created a new vested right calling for a defendant charged with first-degree murder to be given notice within 45 days of arraignment if the State intends to seek the death penalty. In creating this right, the Legislature also simultaneously created a method to enforce its compliance, as set forth in section 921.141(1), which provides in
pertinent part:

> 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 factors enumerated in subsection (6) and for which notice has been provided pursuant to s.782.04(1)(b)….

FLA. STAT. § 921.141(1) (2017). Under subsection 2 of the new statute, the failure to provide notice of aggravating factor(s) precludes that State from introducing evidence of such at trial:

(a) After hearing all of the evidence presented regarding aggravating factors...the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor...

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding...must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

FLA. STAT. § 921.141(2) (2017). Consequently, without statutorily mandated notice being provided of aggravating factor(s), evidence regarding aggravation may not be introduced, and a jury, in turn, cannot find a defendant eligible for death. As a result, the newly implemented requirement that the State provide a defendant with 45 days notice of any potential aggravating factors constituted a substantive change in the death penalty statute. As a result, it cannot apply retroactively in the instant case.

The State's Notice was not Served or Filed Within 45 days of the Arraignment

In *Hurst v. Florida*, 136 S.Ct. 616 (2016), the United States Supreme Court held that Florida's death penalty scheme violated the Sixth Amendment because aggravating circumstances are elements of a capital homicide which must be pled by the State and unanimously found by a jury. *Hurst* analytically developed the rationale of a string of Sixth Amendment decisions beginning with *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which determined that any fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element of the offense. *Hurst*, 136 S.Ct. at 621.

In *Jones*, the Supreme Court, construing a federal statute, held the Fifth Amendment Due Process Clause and the notice and jury trial guarantees of the Sixth Amendment required that any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. 526 U.S. at 243. In *Apprendi*, which involved a state criminal prosecution, the Court held the Fourteenth Amendment commanded the same answer. 530 U.S. at 476. In a subsequent case, a plurality of the Court observed that when *Apprendi* and an earlier decision, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), are read together, they require that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. *Harris v. United States*, 536 U.S. 545, 567 (2002); *see also Ring v. Arizona*, 536 U.S. 584, 605 (2002) (stating government's characterization of a fact or circumstance as an element or a sentencing factor is not determinative of what constitutional protections apply). Later, the Court in *Blakely v. Washington*, 542 U.S. 296 (2004), defined what the statutory maximum penalty was for purposes of determining whether a fact considered at sentencing was an element required to be submitted to the jury. The Court held:

> Our precedents make clear ... that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant statutory maximum is
> not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Id. at 303-04 (citations omitted).

Based on the foregoing, if a defendant's authorized punishment may be increased upon the finding of a fact, that fact must be treated as an element of the crime for constitutional purposes. *Ring*, 536 U.S. at 602 (holding factual finding authorizing death penalty must be found by a jury beyond a reasonable doubt). In order to comply with *Hurst*, the Florida Legislature amended the murder statute, section 782.04, which now states in pertinent part:

> If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe
> it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

FLA. STAT. § 782.04(1)(b).

A basic tenet of statutory construction is that the statutory language must be given its plain and ordinary meaning. *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992). When the statute is clear, the court must apply its plain meaning. When the statutory language is clear, courts have no occasion to resort to rules of construction they must read the statute as written, for to do otherwise would
constitute an abrogation of legislative power. *Daniels v. Florida Department of Health*, 898 So. 2d 61, 64-65 (Fla. 2005). The word "must," like the word "shall," indicates that the act or matter in question is mandatory in nature. *Kelly v. State*, 795 So. 2d 135 (Fla. 5th DCA 2001); *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002) (holding that the 30-day time period under the Jimmy Ryce Act which specifically states that the court shall conduct a trial within thirty days after the determination of probable cause was mandatory). The use of the term "must" in Section 782.04(1)(b), clearly conditions the prosecution's right to seek the death penalty on its filing of a notice of intent to seek death and a listing of the potential aggravators within 45 days of the arraignment. A timely notice is thus a statutorily mandated requirement for the death penalty's applicability. The notice effectively
reclassifies a non-capital homicide to a capital murder. As such, the notification fulfills the same due process function as an indictment or information, which is required to allege every essential element of the crime, by putting the defendant on notice that he is subject to the death penalty and the factual bases supporting the potential sentence.

In Florida, a capital crime can only be charged by indictment. See Art. 1, s. 15, FLA. CONST.; FLA. R. CRIM. P.. 3.140(a). An indictment, unlike an information, cannot be amended, not even by the grand jury, to charge a different, similar, or new offense. *See Akins v. State*, 691 So. 2d 587 (Fla. 1st DCA 1997). An indictment may be amended only to correct a defect, error, or omission in a caption. FLA. R. CRIM. P. 3.140(c)(1). It is well established that the Sixth Amendment provides for a right to be informed of all elements of a crime. *See* Art. 1, s. 9, FLA. CONST.; *Price v. State*, 995 So. 2d 401 (Fla. 208). The 45-day period is thus not comparable to other procedural time-limits which do not implicate fundamental constitutional rights. Significantly, the Legislature's intent to create a rigid time frame is evidenced by the absence of a provision for an extension of the time to file the notice. The only admissible temporal enlargement is for the amendment of a timely filed notice and only in the rare instances where the State can demonstrate good cause. Under the prior capital punishment scheme, the 45-day notification requirement was governed by Rule 3.202(a), which stated as follows:

> Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

The rule noted that if the State did not comply with the 45-day period, it would only affect the defendant's discovery obligations with respect to the penalty phase, but would not impede the State from seeking the death penalty. In crafting section 782.04(b), the Legislature omitted any mention of the State's enduring ability to seek the death penalty upon its failure to file a timely notice. When construing a statute, omissions must be presumed to be deliberate. See *Cook v. State*, 381 So. 2d
1368 (Fla. 1980); *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244 (Fla. 2008). If the Legislature had intended that the violation of the 45-day cutoff would not fatally impair the State's right to seek the death penalty, it would have included a provision similar to the one in Rule 3.202(a). In this case, because the State failed to comply with the 45-day notice requirement, the prosecution is barred from seeking the death penalty against Mr. Figueroa-Sanabria.

The Indictment Fails to Allege the Proposed Aggravators, which are Essential Elements of the Offense

The indictment rendered by the grand jury does not list the aggravating factors that the State proposes would be applicable in the instant case to support the imposition of a death sentence. The state, correspondingly, has no authority to seek a punishment where the charging document has not alleged every fact justifying that punishment.

Justice Scalia pointed out in a concurring opinion to *Ring* that the findings that must be made in support of an enhanced sentence are elements for constitutional purposes:

> … [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). The elements needed to seek imposition of the death penalty are elements of capital murder:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, **all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury**. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. … .

Hurst v. State, 202 So. 3d 40, 53–54 (Fla. 2016) (italics in original; emphasis added). *See also Evans v. State*, SC16-1946, 2017 WL 664191, at 2-3 (Fla. Feb. 20, 2017) (stating that death sentence requires unanimous jury finding of these elements).

The Florida Supreme Court ruled that the elements of capital murder in Florida include the individual aggravating circumstances and the fact that the aggravating circumstances are sufficient to support a death sentence. *Hurst v. State*, 202 So. 3d 40, 53–54 (Fla. 2016). It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged
by the state. *Gray v. State*, 435 So. 2d 816, 818 (Fla. 1983); *see Thorhill v. Alabama*, 310 U.S. 88, 96 (1940) (conviction upon a charge not made would be a sheer denial of due process); *Price v. State*, 995 So. 2d 401, 404 (Fla. 2008) ("There is a denial of due process when there is a conviction on a charge not made in the information or indictment.") Florida Rules of Criminal Procedure 3.140(b)
and (d) also require that the essential elements constituting the offense charged be pled in an indictment or information. "Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." *Gray*, 435 So. 2d at 818. It is undisputed that the charging document "must allege each of the essential elements" of the crime. *Insko v. State*, 969 So. 2d 992, 995 (Fla. 2007) (quoting *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977)).

The Due Process and Notice Clauses of our constitution require that essential elements constituting the offense charged be set forth in the charging document. Art. 1, §§ 9, 16, Fla.Const.; *Drain v. State*, 601 So. 2d 256, 261 (Fla. 5th DCA 1992). It is essential to the rule of fundamental fairness under the notice requirement of due process that the charging document contain all elements of the offense of capital murder. Thus, to obtain a sentence for a particular offense, the state must allege every element of that offense:

> To "enhance a defendant's sentence under section 775.087(2), the grounds for enhancement must be clearly charged in the information." *Arnett,* 128 So.3d at 88. " 'It is a basic tenet of constitutional law that due process is violated when an individual is convicted of a crime not charged in the charging instrument.' " *Terry v. State,* 14 So.3d 264, 266 (Fla. 4th DCA 2009) (quoting *Castillo v. State,* 929 So.2d 1180, 1181 (Fla. 4th DCA 2006)).

Grant v. State, 138 So. 3d 1079, 1086 (Fla. 4th DCA 2014). *See also Whitehead v. St* o. 2d 139, 140 (Fla. 2d DCA 2004) ("Because the information did not charge the grounds for enhancement, Whitehead's minimum mandatory sentence is illegal… .").

This basic precept takes on particular significance when the charging document is an indictment. Article I, section 15 of the Florida Constitution mandates that a trial for a capital crime must be by indictment, thus guaranteeing that a probable cause determination is made by a neutral arbiter. The right to a grand jury in capital cases is also guaranteed by the 5th Amendment of the United States Constitution through the 14th Amendment. Because the indictment does not allege the essential elements that warrant a death sentence, as a matter of law, the death penalty is not an available sentence if the petitioner is convicted as charged.

Only a Grand Jury as Guaranteed by the Florida Constitution can Charge all Elements of Capital Murder

Indictment by a grand jury is the constitutionally mandated predicate for seeking the death penalty. "No person shall be tried for capital crime without presentment or indictment by a grand jury[.]" Art. I, § 15 (a), FLA. CONST. Because the Grand Jury did not make a finding to support the application of the death penalty, Mr. Figueroa- Sanabria cannot be subject to the death penalty in this case.

It is solely within the province of the grand jury to determine whether the state can seek to take a life. The Florida Constitution grants no such authority to state attorneys. In this case, the state attorney has unilaterally determined to seek the death penalty, thereby unlawfully removing the grand jury from the process that determines whether the offense is a capital one or not. Stated otherwise, the grand jury either was not presented with evidence to support aggravating factors, or found none exists. A grand jury indictment is a limitation on the scope of the prosecution that follows. A prosecutor, of course, cannot prosecute a crime greater than that contained in the grand jury indictment. Based upon the indictment returned by the grand jury in this case, the maximum penalty for the crime charged is life in prison.

In *Hurst v. State*, 202 So. 3d at 54, the Florida Supreme Court noted the historical importance of the grand jury in capital prosecutions:

> The right to a unanimous jury in English jurisprudence has roots reaching back centuries, as evidenced by Sir William Blackstone in his *Commentaries on the Laws of England,* originally published from 1765 through 1769. There he stated, "But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 W. Blackstone, *Commentaries on the Laws of England,* 349–50 (Rees Welsh & Co. ed. 1898).

The grand jury alone can find probable cause to seek the death penalty. The grand jury alone can find probable cause for each element of a capital murder and include those findings in its indictment; the trial jury must then find whether each element alleged has been proven beyond a reasonable doubt. But where, as here, the grand jury did not find probable cause for each such element, the state has no authority or discretion to seek a death sentence and, as recognized in a different but similar context, death-qualification of the jury is barred:

> As indicated by this court in *Reed*, the state will not be allowed to death-qualify a jury in a case in which it appears that the death penalty may not be imposed as a matter of law. Although the state continued to pursue two charges of first degree murder against Lark, and to seek the death penalty on each, the jury returned a verdict of second degree murder as to one charge, and the trial court declined to impose the death penalty as to the remaining charge. Accordingly, Lark may not again be subjected to the death penalty, *Wright v. State,* 586 So.2d 1024 (Fla.1991), nor may he be retried on a charge of first degree murder as to the count on which the jury convicted him of second degree murder. *H.L.A. v. State,* 395 So.2d 250 (Fla. 1st DCA 1981). Since there exists, therefore, no possibility that Lark will ever be tried before death-qualified jury on these charges, we do not reach this point on appeal.

Lark v. State, 617 So. 2d 782, 784 (Fla. 1st DCA 1993).

WHEREFORE a death sentence cannot be imposed in this case because the indictment charges first degree murder and does not allege the additional elements necessary to charge capital murder. The indictment fails to allege any aggravating factor set out in section 921.141. Indeed, the indictment does not even minimally reference the elements of capital murder or the governing statute. Without probable- cause findings by the grand jury of all elements of capital murder, the maximum penalty is life imprisonment. *See* FLA. STAT. § 775.082(1)(a) (2017).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished electronically to co-counsel and the Office of the State Attorney, on this 29th day of January, 2026.

Respectfully submitted,

/s/ Daniel M. Hernandez
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