

No. SC17-42

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IN THE  
**Supreme Court of Florida**

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RICHARD EUGENE HAMILTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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**BRIEF OF AMICUS CURIAE,  
THE CAPITAL HABEAS UNIT OF THE  
OFFICE OF THE FEDERAL PUBLIC DEFENDER  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
IN SUPPORT OF APPELLANT RICHARD HAMILTON**

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## **UNOPPOSED REQUEST FOR LEAVE TO FILE UNDER RULE 9.370**

The Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida (“CHU”), as amicus curiae, respectfully moves for leave to file the accompanying brief in support of Appellant Richard E. Hamilton.

The Statement of Interest describes the interest of the CHU and its belief that the arguments presented in the amicus curiae brief will be helpful to the Court.

Hamilton’s counsel has agreed to the filing of this brief. Counsel for the State of Florida does not oppose the filing of this brief.

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida (“CHU”) was established by the Administrative Office of the United States Courts with the concurrence of the Chief Judges of the United States Court of Appeals for the Eleventh Circuit and United States District Court for the Northern District of Florida. The CHU was formed to address recurring problems relating to the provision of meaningful capital defense services in Florida. The CHU advises, assists, and trains counsel in capital post-conviction cases, and directly represents death-sentenced prisoners in both federal habeas cases and in Florida’s state courts where necessary to protect federal rights.

The CHU has an interest in this proceeding and a helpful perspective to provide to the Court, arising from its role as the institutional federal capital defender of Florida, which includes consultation with Florida’s capital defense bar and representation of numerous clients presenting claims under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The CHU was granted leave by this Court to file amicus briefs addressing *Hurst* in three previous cases. *See Lambrix v. State*, Nos. SC16-8 & SC16-56; *Asay v. State*, Nos. SC16-102 & SC 16-223; *Patrick v. State*, Nos. SC16-801 & SC17-246. In those amicus briefs, the CHU addressed retroactivity and the harmless error doctrine in the context of *Hurst*.

In this amicus brief, the CHU revisits retroactivity and harmless error in light of this Court’s recent *Hurst* decisions with an emphasis on the constitutional retroactivity “floor” established by federal law. The brief analyzes those decisions and federal retroactivity principles in the context of Hamilton’s case. The brief discusses issues arising under *Hurst* that the Court has not previously addressed.

All parties consent to the filing of this amicus brief.

### **SUMMARY OF ARGUMENT**

Hamilton’s death sentence violates *Hurst v. Florida* and *Hurst v. State*. Although Florida maintains its own state retroactivity doctrines, the United States Constitution sets a retroactivity “floor” that requires both *Hurst v. Florida* and *Hurst v. State* to be applied retroactively to Hamilton without regard to when his death sentence became final on direct appeal. Even if federal law did not require Florida’s state courts to apply *Hurst* retroactively to Hamilton, he should receive the retroactive benefit of *Hurst* under Florida law. The *Hurst* error in Hamilton’s case cannot be proven harmless beyond a reasonable doubt under this Court’s precedent because his jury recommended death by a non-unanimous vote of 10 to 2.

### **ARGUMENT**

#### **I. Hamilton’s death sentence violates *Hurst v. Florida* and *Hurst v. State***

Hamilton’s death sentence violates *Hurst v. Florida* and *Hurst v. State*. The United States Supreme Court held in *Hurst v. Florida* that the same Florida scheme

under which Hamilton was sentenced violated the Sixth Amendment because it required the trial judge, not the “advisory” jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings of fact include: (1) the aggravating circumstances that were proven; (2) the “sufficiency” of the aggravating circumstances to justify imposition of the death penalty; and (3) whether the aggravating circumstances outweigh mitigating circumstances. Florida’s scheme constitutionally failed by first requiring an “advisory” jury to render a generalized sentencing recommendation by a majority vote, and then allowing the sentencing judge to conduct the fact-finding described above. *See id.* at 622. Hamilton was sentenced to death under this unconstitutional scheme. Accordingly, his death sentence is unconstitutional under *Hurst v. Florida*.

Hamilton’s death sentence is also unconstitutional under this Court’s decision on remand in *Hurst v. State*. That decision made clear that the Eighth Amendment requires the jury to unanimously find as fact, beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweighed the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Moreover, the Court stated that unanimous jury fact-finding on each of those “elements” is still not enough for a death sentence to be constitutionally imposed. In addition to unanimously finding each of the

elements, the jury must then render a unanimous overall recommendation of death. *Id.* at 57. And, notwithstanding any fact-finding, the jury is never required to recommend the death penalty. *Id.* at 57-58. Hamilton’s jury, which operated under the prior statute, was never asked to find any facts unanimously—that responsibility was reserved for the judge alone—and Hamilton’s jury was also never instructed that its recommendation must be unanimous. Nothing in the record reveals which jurors considered which aggravating factors, or which jurors considered which combination of aggravating factors “sufficient” for death, or which jurors found which combination of aggravating factors outweighed the mitigation in the case.

To the extent that this Court may have previously reviewed Hamilton’s death sentence under *Hurst v. Florida* in a habeas corpus proceeding filed prior to the decision in *Hurst v. State*, due process considerations require that such decision not foreclose reevaluation of *Hurst* relief in this proceeding, particularly in light of the significant constitutional principles announced in the intervening *Hurst v. State* decision, as described above. *See State v. Owen*, 696 S. 2d 715, 720 (Fla. 1997) (explaining that this Court has “the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.”); *see also Marshall v. Jones*, No. SC16-779, slip op. at 2 (Fla. May 4, 2017) (Labarga, C.J., dissenting) (citing *Owen* in dissent from denial of *Hurst* relief).

Because Hamilton’s death sentence violates *Hurst v. Florida* and *Hurst v. State*, the only remaining inquiries for this Court are (1) whether those decisions apply retroactively to him, and (2) whether the *Hurst* errors in his case can be proven harmless beyond a reasonable doubt. For the reasons below, amicus urges that *Hurst* is retroactive to Hamilton and that the errors in Hamilton’s case were not harmless.

**II. The United States Constitution requires Florida’s state courts to apply *Hurst* retroactively to Hamilton and other similarly situated prisoners, regardless of the date their death sentences became final relative to *Ring***

Although Florida maintains its own state retroactivity doctrines, the United States Constitution sets a retroactivity “floor” to which all state retroactivity determinations must adhere. In the *Hurst* context, the Constitution requires that both *Hurst v. Florida* and *Hurst v. State* be applied retroactively to Hamilton and other similarly situated prisoners without regard to when their death sentences became final relative to *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or any other decision that preceded *Hurst*. The concept of “partial retroactivity,” whereby a constitutional rule is applied retroactively to some cases on collateral review but not others, violates the Eighth and Fourteenth Amendments.

The Supremacy Clause of the United States Constitution requires state post-conviction courts to apply “substantive” constitutional rules retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their

confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”). This federal constitutional requirement applies even where a state supreme court applies its state’s own retroactivity doctrine. *See id.* That was the issue before the United States Supreme Court in *Montgomery*, wherein a Louisiana defendant brought a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The Louisiana Supreme Court denied *Miller* relief on state retroactivity grounds. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the constitutional *Miller* rule was substantive, the state court were obligated to apply it retroactively, even under its own state retroactivity doctrine. *See id.* at 732-34.

Florida’s state courts are required to apply *Hurst* retroactively, even under Florida’s state retroactivity doctrines, because the *Hurst* decisions announced substantive rules within the meaning of federal law. Two substantive rules were announced in *Hurst v. State*. First, this Court held that, in light of the United States Supreme Court’s decision in *Hurst v. Florida*, the Sixth Amendment requires that a jury find as fact, beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating

circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. As the United States Supreme Court has consistently emphasized, such proof-beyond-a-reasonable doubt rules are substantive, not procedural. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *see also Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural rule). Federal judges in Florida have already recognized the impact of the beyond-a-reasonable-doubt standard on the federal retroactivity of *Hurst*. *See, e.g., Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* may be retroactive as a matter of federal law because “[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.”) (citing *Ivan V.*, 407 U.S. at 205).

The second substantive rule announced by this Court was the Eighth Amendment’s requirement of unanimous jury fact-finding as to (1) each aggravating circumstance; (2) those particular aggravators’ cumulative sufficiency to justify the death penalty; and (3) those particular aggravators’ cumulative outweighing of the mitigation. The substantive nature of the unanimity rule is apparent from this Court’s explanation in *Hurst v. State* that unanimity (1) is required to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination “expresses the values of the community as they currently relate to the imposition of

the death penalty.” *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida’s death-sentencing scheme complies with the Eighth Amendment and “achieve the important goal of bringing [Florida’s] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.” *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

Federal law’s requirement that *Hurst* be applied retroactively is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), wherein the United States Supreme Court held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* did not review a statute, like Florida’s, that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death. Moreover, as noted above, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such

decisions as substantive. *See Ivan V.*, 407 U.S. at 205; *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware’s state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”). And with *Hurst*, unlike in *Summerlin*, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment’s jury-trial guarantee. *See Summerlin*, 542 U.S. at 353.

The United States Supreme Court’s decision in *Welch* is illustrative of the substantive nature of *Hurst*. In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed for a sentencing increase where the defendant had three or more prior convictions for any felony that “involves conduct that presents a serious risk of physical injury to another,” was unconstitutional under the Fifth and Fourteenth Amendment’s void-for-vagueness doctrine. *Id.* at 2556. In *Welch*, the Court held that *Johnson*’s constitutional ruling was substantive because it “affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied,” and therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural “does not depend on whether the underlying constitutional guarantee is characterized as

procedural or substantive,” but rather whether “the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes.” *Id.* at 1266. In *Welch*, the Court pointed out that, “[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence.” *Id.* Thus, the Court explained, “*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause.” *Id.* “It follows,” the Court held, “that *Johnson* is a substantive decision.” *Id.* (internal quotation omitted). The same reasoning applies to the *Hurst* decisions.

Under the reasoning of *Welch*, the *Hurst* decisions announced substantive rules that must be applied retroactively. The holding in *Hurst v. Florida* and *Hurst v. State* that the Sixth Amendment requires each element of a Florida death sentence to be found beyond a reasonable doubt, and this Court’s holding in *Hurst v. State* that jury unanimity is required to ensure that Florida’s overall capital system complies with the Eighth Amendment by narrowing the class of death-eligible defendants to those “convicted of the most aggravated and the least mitigated of murders,” 202 So. 3d at 50, are substantive constitutional rulings within the meaning of federal law that place certain murders “beyond the State’s power to punish,”

*Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, individuals who engaged in the same conduct will no longer be subject to a capital sentencing scheme that delegates fact-finding authority to the judge alone, eschews the right to jury fact-finding under a beyond-a-reasonable-doubt standard, and allows death sentences to be imposed based on non-unanimous jury votes. That scheme “can no longer mandate or authorize any sentence,” and “[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on” such a scheme. *Id.* Indeed, this Court emphasized in *Hurst v. State* that the “unanimous finding of aggravating factors and the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment.*” 202 So. 3d at 60 (emphasis added). The decision in *Welch* makes clear that a substantive rule, rather than procedural rule, thereby resulted. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters . . . the class of persons that the law punishes.”).

To the extent that Florida’s state retroactivity doctrines may countenance the concept of “partial retroactivity,” whereby the traditional binary nature of retroactivity analysis is discarded in favor of a novel framework that allows state courts to pick and choose which capital cases on collateral review can receive the retroactive benefit of a constitutional rule—based on, for instance, when the death sentence was finalized in relation to some precedent that came before the

constitutional rule was announced, that concept violates the United States Constitution. Under federal law, there is no such thing as partial retroactivity, and if a state court decides that a constitutional rule is retroactive to some cases on collateral review, it cannot deny retroactivity to other cases based solely on the date the death sentence became final on direct appeal relative to some prior precedent.

Here, for purposes of federal law, Hamilton's right to *Hurst* retroactivity is not impacted by the date his death sentence became final relative to *Apprendi*, *Ring*, or any other cases that preceded *Hurst*. If federal law allowed for partial retroactivity in the *Hurst* context, it would lead to absurd and constitutionally impermissible results. For instance, if a retroactivity "line" were to be drawn at *Ring*, it would result in the denial of *Hurst* retroactivity to individuals like Hamilton whose death sentences became final on direct appeal shortly before *Ring*, while at the same time granting *Hurst* retroactivity to other individuals who arrived on death row years or perhaps decades earlier but were granted new penalty phases on other grounds and then resentenced to death after *Ring*.

In addition, although not directly relevant here, making *Hurst* only partially retroactive to post-*Ring* sentences would unfairly deny *Hurst* access to defendants who were sentenced between the decisions in *Apprendi* and *Ring*. The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. See *Ring*, 536 U.S. at 588-89. And

in *Hurst*, the Court repeatedly stated that Florida’s scheme was incompatible with “*Apprendi*’s rule,” of which *Ring* was an application. 136 S. Ct. at 621. This Court itself has acknowledged that *Ring* was an application of *Apprendi*. See *Mosley v. State*, 209 So. 3d 1248, 1279-80 (Fla. 2016). Failure to include post-*Apprendi* defendants among those eligible to seek *Hurst* relief would violate both the Eighth Amendment’s requirement of culpability-related decision-making in capital cases, and the Fourteenth Amendment’s requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

If this Court were to deny *Hurst* relief to Hamilton on retroactivity grounds without addressing the foregoing federal constitutional concepts or recognize Hamilton’s right to *Hurst* retroactivity under federal law, it would result in the denial of Hamilton’s due process rights arising from the retroactivity “floor” that has been established by the applicable decisions of the United States Supreme Court. Although states like Florida may always grant broader retrospective relief when reviewing their own state convictions, see *Danforth v. Minnesota*, 552 U.S. 264, 277, 280-82 (2008), states may not narrow federal rights, including by adopting a “partial retroactivity” approach that unfairly denies relief to pre-*Ring* defendants.

**III. Even if federal law did not require Florida’s state courts to apply *Hurst* retroactively to Hamilton, he and other similarly situated prisoners should receive the benefit of *Hurst* as a matter of Florida law**

Even if federal law did not require Florida’s state courts to apply *Hurst* retroactively to Hamilton, he and other similarly situated prisoners should receive the benefit of *Hurst* as a matter of Florida law. The *Hurst* decisions are retroactive to Hamilton under Florida’s equitable fundamental fairness doctrine, which is an independent retroactivity analysis that does not rely on Florida’s traditional retroactivity framework articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and which applies without regard to when a death sentence became final relative to *Ring*.

In *Mosley*, this Court explained that, although *Witt* articulated Florida’s “standard” retroactivity analysis, defendants may be separately afforded *Hurst* retroactivity under the fundamental fairness doctrine, which the Court has applied in other contexts such as in *James v. State*, 615 So. 2d 668 (Fla. 1993). *See Mosley*, 209 So. 3d at 1274 (“This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty.”). Fundamental fairness does not consider the date a sentence became final relative to *Ring*, instead focusing on whether it would be inequitable to deny the defendant the opportunity to seek *Hurst* relief. *See id.* at 1274-75. The doctrine applies where a defendant tried as best as he reasonably could to challenge Florida’s unconstitutional capital sentencing scheme before *Hurst*. *See id.* at 1275 & n.13.

The fundamental fairness doctrine applies favorably to Hamilton because, although his direct appeal was pre-*Ring*, he attempted to challenge Florida’s unconstitutional capital sentencing scheme under *Ring* at his first opportunity. This Court rejected Hamilton’s *Ring* claim under its precedent holding that *Ring* did not apply in Florida. *See Hamilton v. State*, 875 So. 2d 586, 590 n.3 (Fla. 2004). That precedent was subsequently overruled, and Hamilton’s argument vindicated, by the United States Supreme Court in *Hurst*. Under the fundamental fairness doctrine, those circumstances support applying the *Hurst* decisions retroactively to Hamilton, who anticipated the defects in Florida’s capital sentencing scheme that were later articulated in the *Hurst* decisions, and who raised those defects after *Ring* only to be rebuffed under this Court’s flawed pre-*Hurst* precedent. As a matter of fundamental fairness, Hamilton should not now be denied the chance to seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Hamilton “in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness.” *Mosley*, So. 3d at 1283.

In addition to the fundamental fairness doctrine, this Court’s precedent affords Hamilton the right to an individualized *Witt* retroactivity analysis, in which his pre-*Ring* sentence would be a factor weighed against retroactivity, but would not be a dispositive factor in the analysis. This principle is in accord with *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *Mosley*, and subsequent decisions of this Court.

In *Mosley* and *Asay*, this Court altered the *Witt* retroactivity doctrine by rejecting traditional notions of retroactivity as a binary concept—i.e., where a new constitutional rule is considered either retroactive to all cases on collateral review or retroactive to no cases on collateral review—and endorsing instead a case-specific analysis for *Hurst* claims. The Court suggested that a pre-*Ring* sentence was a factor against *Witt* retroactivity, while a post-*Ring* sentence was a factor favoring *Witt* retroactivity.<sup>1</sup> In *Mosley*, the Court made clear that the fact that a death sentence became final after *Ring* is so weighty that it is effectively categorical. But even when distinguishing between sentences finalized before and after *Ring*, this Court did not retreat from its signal that *Witt* analysis must be conducted on a case-by-case basis.

Indeed, in *Asay* and *Mosley* themselves, the Court reached individualized conclusions on the critical third *Witt* prong, which requires examination of three factors—(1) purpose, (2) extent of reliance, and (3) effect on the administration of justice. Compare *Asay*, 210 So. 3d at 17-21 (concluding as to the third *Witt* prong that the first factor weighed “in favor” of retroactivity, the second factor weighed “heavily against” retroactivity, and the third factor weighed “heavily against” retroactivity), with *Mosley*, 209 So. 3d at 1277-83 (concluding as to the same third

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<sup>1</sup> While this Court focused on *Ring* in those prior cases, *Ring* itself was founded upon the decision in *Apprendi*, decided approximately two years before *Ring*. This Court has not yet addressed a sentence that became final between *Ring* and *Apprendi*. Under the logic of this Court’s decisions, there is no reason to believe that a post-*Apprendi* sentence should not be treated in the same way as a post-*Ring* sentence.

*Witt* prong that the first factor weighed “heavily in favor” of retroactivity, the second factor weighed “in favor” of retroactivity, and the third factor weighed in favor of retroactivity). And, it is noteworthy that in *Asay*, this Court limited its retroactivity analysis to the United States Supreme Court’s decision in *Hurst v. Florida* and did not consider *Hurst v. State*. The absence of any holding on the *Witt* retroactivity of *Hurst v. State* in *Asay* means that *Asay*’s retroactivity analysis under *Witt* is applicable only with respect to *Hurst v. Florida* claims, not *Hurst v. State* claims.

To be sure, the Court has suggested in subsequent cases that a defendant’s pre-*Ring* sentence was a significantly weighty factor in denying *Hurst* retroactivity under a *Witt* analysis. See *Gaskin v. State*, No. SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017); *Bogle v. State*, No. SC11-2403, 2017 WL 526507 (Fla. Feb. 9, 2017). However, this Court has never backed away from the principle undergirding the disparate *Asay* and *Mosley* opinions—that *Witt* retroactivity analysis requires individualized assessments.

Accordingly, under this Court’s new conceptualization of *Witt* as a case-specific retroactivity assessment, Hamilton should be afforded an individualized *Witt* analysis. In conducting that analysis, it is appropriate for this Court to consider whether the critical third *Witt* prong favors retroactivity based not merely on the date Hamilton’s sentence became final, but on all of the individual circumstances of his particular case.

In Hamilton’s case, the first consideration under the third *Witt* prong—the purpose of the *Hurst* decisions—weighs in favor of retroactivity. This Court stated in *Asay* that the purpose of *Hurst v. Florida* (*Asay* did not address *Hurst v. State*) “is to ensure that a criminal defendant’s right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury.” *Asay*, 210 So. 3d at 17. In *Mosley*, the Court added that the purpose of *Hurst v. State* was to enshrine Florida’s “longstanding history requiring unanimous jury verdicts as to the elements of a crime” into the state’s capital sentencing scheme. *Mosley*, 209 So. 3d at 1278. Here, Hamilton has raised claims under both *Hurst v. Florida* and *Hurst v. State*. The purpose of those decisions together weighs “heavily” in favor of retroactivity. *See Mosley*, 209 So. 3d at 1277 (emphasizing that the jury trial right is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases).

The second *Witt* consideration—the extent of reliance on Florida’s unconstitutional pre-*Hurst* scheme—also weighs in favor of applying *Hurst v. Florida* and *Hurst v. State* retroactively to Hamilton. The Court in *Mosley* found that the extent of reliance factor weighed “in favor” of applying the *Hurst* decisions retroactively to all post-*Ring* defendants. *Id.* at 1281. The Court limited its analysis to the extent of reliance after *Ring* only because *Mosley* was a post-*Ring* case. But

the same analysis should apply to pre-*Ring* defendants. Florida's unconstitutional sentencing scheme has not just been unconstitutional since *Ring* was decided in 2002, it was also unconstitutional before *Ring*, when Hamilton was sentenced.

The third *Witt* consideration—the effect on the administration of justice—also weighs in favor of applying the *Hurst* decisions retroactively to Hamilton. This consideration does not disfavor retroactivity unless it would “destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.” *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So.2d at 929-30). This Court has already approved *Hurst* retroactivity as to nearly two hundred prisoners on Florida's death row with post-*Ring* sentences. *See Mosley*, 209 So. 3d at 1281. There is no reason to believe that extending retroactivity to another approximately two hundred individuals who were sentenced pre-*Ring* would grind Florida's judiciary to a halt.

Accordingly, even if the United States Constitution did not require this Court to apply *Hurst* retroactively to Hamilton, he should receive the benefit of *Hurst* as a matter of Florida law under the fundamental fairness and *Witt* retroactivity doctrines.

**IV. Because Hamilton's jury recommended the death penalty by a vote of 10 to 2, the *Hurst* errors in his case cannot be proven harmless beyond a reasonable doubt under this Court's precedent establishing that *Hurst* errors are never harmless where at least one juror recommended life**

Because Hamilton's death sentence violates *Hurst v. Florida* and *Hurst v. State*, and those decisions are retroactive to him under both federal and state law,

Hamilton should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was “harmless beyond a reasonable doubt.” *Hurst v. State*, 202 So. 3d at 68. In the *Hurst* context, this Court has defined “harmless beyond a reasonable doubt” as “no reasonable probability that the error contributed to the sentence.” *Id.* The “State bears an extremely heavy burden” in this context. *Id.* at 68. The State’s ability to meet its harmless-error burden is “rare.” *King v. State*, No. SC14-1949, 2017 WL 372081, at \*17 (Fla. Jan. 26, 2017).

The *Hurst* error in Hamilton’s case was not harmless beyond a reasonable doubt because his advisory jury recommended the death penalty by a non-unanimous vote of 10 to 2. This Court’s precedent establishes that where, as here, the advisory jury’s vote was not unanimous, the State cannot establish that the *Hurst* error was harmless beyond a reasonable doubt. In *Dubose v. State*, the Court made it clear that, “in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless,” regardless of the applicable aggravating and mitigating circumstances. No. SC10-2363, 2017 WL 526506, at \*12 (Fla. Feb. 9, 2017).

The Court has *never* found a *Hurst* error harmless in a case, like Hamilton’s, where the jury vote was not unanimous. The Court has now addressed harmless error and granted relief in numerous non-unanimous-recommendation cases that are materially indistinguishable from Hamilton’s. *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1288 (Fla. 2016) (11-1 jury vote); *McGirth v. State*, 209 So. 3d 1146, 1150

(Fla. 2017) (11-1 jury vote); *Durousseau v. State*, No. SC15-1276, 2017 WL 411331, at \*5-6 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 569 (Fla. 2017) (10-2 jury vote); *Hodges v. State*, No. SC14-878, 2017 WL 1024527 at \*2 (Fla. Mar. 16, 2017) (10-2 jury vote); *Smith v. State*, Nos. SC12-2466 & SC13-2111, 2017 WL 1023710 at \*17 (Fla. Mar. 17, 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1245 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, No. SC13-5, 2017 WL 410215, at \*2 (Fla. Jan. 31, 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4 jury vote); *Mosley*, 209 So. 3d at 1284 (8-4 jury vote); *Dubose*, 2017 WL 526506, at \*11 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, 2017 WL 930924, at \*12 (Fla. Dec. 1, 2016) (8-4 jury vote); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at \*1 (Fla. Mar. 9, 2017) (9-3 and 11-1 jury votes); *Ault v. State*, No. SC14-1441, 2017 WL 930926 at \*8 (Fla. Mar. 9, 2017) (9-3 and 10-2 jury votes); *Jackson v. State*, SC13-1232, 2017 WL 1090546 at \*6 (Fla. Mar. 23, 2017) (11-1 jury vote); *Baker v. State*, Nos. SC13-2331, SC14-873, 2017 WL 1090559 at \*2 (Fla. Mar. 23, 2017) (9-3 jury vote); *Deviney v. State*, No. SC15-1903, 2017 WL 1090560 at \*1 (Fla. Mar. 23, 2017) (8-4 jury vote); *Orme v. State*, Nos. SC13-819 & SC14-22, 2017 WL 1177611, at \*1 (Fla. Mar. 30, 2017) (11-1

jury vote); *Bradley v. State*, No. SC14-1412, 2017 WL 1177618, at \*2 (Fla. Mar. 30, 2017) (10-2 jury vote); *White v. State*, No. SC15-625, 2017 WL 1177640, at \*1 (Fla. Mar. 30, 2017) (11-1 jury vote); *Guzman v. State*, No. SC13-1002, 2017 WL 1282099, at \*1 (Fla. Apr. 6, 2017) (7-5 jury vote); *Abdool v. State*, Nos. SC14-582 & SC14-2039, 2017 WL 1282105, at \*8 (Fla. Apr. 6, 2017) (10-2 jury vote); *Newberry v. State*, No. SC14-703, 2017 WL 1282108, at \*4-5 (Fla. Apr. 6, 2017) (8-4 jury vote); *Heyne v. State*, No. SC14-1800, 2017 WL 1282104, at \*5 (Fla. Apr. 6, 2017) (10-2 jury vote); *Robards v. State*, No. SC15-1364, 2017 WL 1282109, at \*5 (Fla. Apr. 6, 2017) (7-5 jury vote); *McMillian v. State*, No. SC14-1796, 2017 WL 1366120, at \*11 (Fla. Apr. 13, 2017) (10-2 jury vote); *Brookins v. State*, No. SC14-418, 2017 WL 1409664, at \*7 (Fla. Apr. 20, 2017) (10-2 jury vote); *Banks v. Jones*, No. SC15-297, 2017 WL 1409666, at \*9 (Fla. Apr. 20, 2017) (10-2 jury vote). The same harmless error result should occur in Hamilton's case.

## **CONCLUSION**

For the foregoing reasons, amicus curiae respectfully submits that Hamilton's death sentence should be vacated.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2017, the foregoing was served via the e-portal to Assistant Capital Collateral Regional Counsel Karen L. Moore and Assistant Capital Collateral Regional Counsel Stacy R. Biggart, counsel for Appellant Richard E. Hamilton, at karen.moore@ccrc-north.org and stacy.biggart@ccrc.north.org; and to Assistant Attorney General Jennifer Keegan, counsel for the State of Florida, at jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas

Billy H. Nolas

### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Billy H. Nolas

Billy H. Nolas