Filing # 58492819 E-Filed 06/30/2017 12:02:16 PM

RECEIVED, 06/30/2017 12:03:26 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-337

STATE OF FLORIDA
Appellant,

v.

WILLIAM FRANCES SILVIA,

Appellee.

POSTCONVICTION APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REQUEST FOR ORAL ARGUMENT 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE FACTS AND OF THE CASE 1

CIRCUIT COURT RULING 3

STANDARD OF REVIEW 4

SUMMARY OF ARGUMENT 4

ARGUMENT
THE POSTCONVICTION COURT DID NOT ERR IN GRANTING MR. SILVIA'S MOTION TO VACATE DEATH SENTENCE AND ORDERING A NEW PENALTY PHASE TRIAL. 5

I. THE CASES RELIED ON BY THE STATE ARE DISTINGUISHABLE AND INAPPLICABLE TO THE CASE AT BAR 5

II. PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THE TRIAL COURT'S RULING SHOULD BE AFFIRMED 15

CONCLUSION 22

CERTIFICATE OF SERVICE 23

CERTIFICATE OF COMPLIANCE 24

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 14
Brant v. State,
197 So.3d 1051, 1079 (Fla. 2016) 6
Durocher v. Singletary,
623 So.2d 482 (Fla. 1993) 2,10
Fitzpatrick v. State,
527 So.2d 809, 811 (Fla. 1988) 18
Floyd v. State,
90 So.2d 105 (Fla. 1956) 21
Furman v. Georgia,
408 U.S. 238 (1972) 18
Goode v. State,
365 So.2d 381, 384 (Fla.1978) 19
Hurst v. Florida,
136 S.Ct. 616 (2012)....................2
Hurst v. State,
202 So. 3d 40, 59–60 (Fla. 2016) 16
Hurst v. State,
202 So.3d 40, 59 (Fla. 2016) 6
Jackson v. Denno,
378 U.S. 368 (1964) 5
James v. State,
974 So. 2d 365 (Fla. 2008) 3, 7
Klokoc v. State,
589 So.2d 219, 221–22 (Fla.1991) 19
McCleskey v. Kemp,
481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) 16

McMann v. Richardson,
397 U.S. 759 (1970) 5
Mosley v. State,
209 So.3d 1248 (Fla. 2016) 7

Mullens v. State,
197 So.3d 16, 39 (Fla. 2016) 6
Ocha v. State,
826 So.2d 956, 964 (Fla.2002) 19
Pangburn v. State,
661 So.2d 1182 (Fla. 1995) 20
Ring v. Arizona,
536 U.S. 584 (2002) 7
Robertson v. State,
143 So.3d 907 (Fla. 2014) 18
Roper v. Simmons,
543 U.S. 551 (2005) 14
Silvia v. State,
123 So.3d 1148 (Fla. 2013) 2
Silvia v. State,
60 So.3d 959 (Fla. 2011) 2
Stephens v. State,
748 So.2d 1028 (Fla. 1999) 4
Tillman v. State,
591 So.2d 167, 169 (Fla. 1991) 18,19
Trease v. State,
41 So. 3d (Fla. 2010) 3, 7
Yacob v. State,
136 So.3d 539, 546 (Fla. 2014) 18,19

Rules

Fla. R. Crim. P. 3.851 (I) (8) (B) 2
Fla. R. Crim. Pro. 3.851 (g) (3)..14
Florida Rule of Criminal Procedure 3.851(i)..10

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Silvia lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Silvia accordingly requests that this Court permit oral argument.

PRELIMINARY STATEMENT

References to the original direct appeal record are in the form (FSC ROA V. p. 123) References to the postconviction record on appeal are in the form (R. p. 123). Generally, William Silvia is referred to as Mr. Silvia throughout this brief. The Office of the Capital Collateral Regional Counsel– Middle Region, representing the Appellee, is shortened to "CCRC-M."

STATEMENT OF THE FACTS AND OF THE CASE

On October 24, 2006, a grand jury in and for Seminole County returned a two count Indictment for: COUNT 1 First Degree premeditated murder of Patricia Ann Silvia. COUNT 2: Attempted first degree premeditated murder of Betty MacIntyre Woodard. (FSC ROA Vol. I p. 4-5). The guilt phase took place from June 2 to June 6, 2008.

The penalty phase was held July 17 to July 21, 2008. The penalty phase jury recommended death by a vote of eleven to one. (FSC ROA Vol. III p. 486). The trial court issued a sentencing order on January 28, 2009. (FSC ROA Vol. III p. 565-584). A timely appeal was filed and this Court affirmed the judgment and sentences. *Silvia v. State,* 60 So.3d 959 (Fla. 2011). A Mandate was returned on May 20, 2011, CCRC-M was appointed on the same date. A Motion to Determine Counsel was heard on June 26, 2012 in circuit court. Subsequent to the hearing, which included a colloquy pursuant to *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), the circuit court, on July 12, 2013, issued a corrected order discharging collateral counsel and dismissing Mr. Silvia's postconviction proceedings. Next, discharged counsel filed a timely notice seeking judicial review, pursuant to Fla. R. Crim. P. 3.851 (I) (8) (B). This Court denied relief on September 11, 2013. *Silvia v. State*, 123 So.3d 1148 (Fla. 2013).

After receiving a letter from Mr. Silvia inquiring about obtaining relief pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2012), undersigned counsel filed a Successive Motion to Vacate Death Sentence based on *Hurst* and its progeny on January 6, 2017. (R. p. 20-42). The State filed its Answer on January 27, 2017. (R. p. 43-63). The Case Management Conference was held on February 7, 2017, at which time both the appellee and appellant presented legal argument, as both sides

agreed that no evidentiary hearing was necessary. (R. p. 401-33). On February 20, 2017, the circuit court issued an Order Vacating Sentence of Death and Setting Status Hearing. (R. p. 371-76). The State's appeal of that ruling brings us to the present juncture.

CIRCUIT COURT RULING

The circuit court granted Mr. Silvia *Hurst* relief, and that matter is not being challenged by the State on appeal. Regarding the waiver issue, which is the focus of the state's appeal, the circuit court found as follows:

> As an initial matter, the State asserts that the Defendant should be precluded from seeking relief under the Hurst rulings because he waived his initial postconviction proceedings in this case. In support of its position, the State cites to James v. State, 974 So. 2d 365 (Fla. 2008) and Trease v. State, 41 So. 3d (Fla. 2010). However, both of those cases involved a defendant's attempt to reinstate his postconviction proceedings after validly waiving those proceedings, whereupon the Florida Supreme Court concluded that a "mere change of mind is an insufficient basis for setting aside a previous waiver." James, 974 So. 2d at 366, 368; Trease, 41 So. 3d at 120-21. In the case a bar, the Defendant is not seeking to reinstate his previously waived postconviction proceedings because he has changed his mind. Rather he is seeking to avail himself of a newly established constitutional right, which has been held to apply retroactively. The Defendant could not knowingly and voluntarily waive a right he did not possess at the time of the waiver. Therefore, the Court finds that he is not precluded from seeking Hurst relief based upon his waiver of his initial postconviction proceedings.

(R. at p. 372-73).
…
ORDERED, that the Defendant's sentence of death as to Count I is VACATED.
(R. p. 375).

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State,* 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference to the factual findings by the lower court. It is important to note that the Honorable Donna L. McIntosh, whose order is the subject of the State's appeal, is the exact same judge who presented Mr. Silvia with his colloquy and later signed the order waiving his postconviction proceedings and discharging counsel in the summer of 2012. The postconviction court has the clear vantage point to understand these proceedings at the trial level, in regards to the law and the application to the facts of the case.

SUMMARY OF ARGUMENT

The trial court did not err in granting Mr. Silvia's Successive Motion to Vacate Death Sentence. Mr. Silvia never waived *Hurs*t relief, as he could not waive a right that did not exist at the time of his 2012 waiver. Mr. Silvia is simply accepting relief based on a newly established constitutional right, which applies retroactively to him. The cases cited by the State in support of their argument do not apply to Mr. Silvia's

situation, as they are distinguishable both factually and legally. The trial court's ruling should be affirmed.

ARGUMENT

THE POSTCONVICTION COURT DID NOT ERR IN GRANTING MR. SILVIA'S MOTION TO VACATE DEATH SENTENCE AND ORDERING A NEW PENALTY PHASE

I. The cases relied on by the State are distinguishable and inapplicable to the case at bar.

This Court should affirm the trial court's order of relief, because the decision is supported both legally and factually. The State's reliance on the cases cited in its initial brief are misplaced. The non-capital case, *McMann v. Richardson*, 397 U.S. 759 (1970), is inapplicable because that case involves three defendants who entered guilty pleas to crimes at the pretrial level, who later tried to avail themselves of a new law pertaining to the procedural aspects of ascertaining the voluntariness of confessions. *Id.* at 765, 771. In relying on an interest in "finality" *Id*. at 774, the Court in *Richardson* precluded the defendants from impeaching their prior guilty pleas based on retroactively applying *Jackson v. Denno*, 378 U.S. 368 (1964); a case that invoked the Due Process Clause of the Fourteenth Amendment to overturn New York's prior trial procedures for determining the voluntariness of confessions. The convictions in *Richardson* were upheld, absent a showing of serious derelictions on

the part of counsel which could prove that the plea was not ultimately a knowing and intelligent act. *Id.* at 774.

Richardson is inapplicable to the case at bar, in that it's not a capital case, and it involves the voluntariness of guilty pleas at the pretrial level, whereas Mr. Silvia is not challenging his convictions at all. Unlike *Richardson*, Mr. Silvia's case also involves the Eighth Amendment as interpreted by *Hurst v. State*, 202 So.3d 40, 59 (Fla. 2016). Lastly, the "finality" concerns in *Richardson* regarding the sheer large number of guilty pleas subject to possible relief, is not comparable to the very small number of possible defendants in the exact same position as Mr. Silvia. Very, very, few people are in Mr. Silvia's position, in regards to the timeliness of *Hurst* relief, provided he is not the only one. *McMann v. Richardson* does not provide guidance for the Court in resolving this matter.

The State's reliance on *Mullens v. State*, 197 So.3d 16, 39 (Fla. 2016) and *Brant v. State,* 197 So.3d 1051, 1079 (Fla. 2016) is also misplaced. Those cases are not relevant to these proceedings, because they involve the waiver of penalty phase juries at the trial level. *Mullens*, a direct appeal case, and *Brant* a postconviction case, are based on defendants seeking *Hurs*t relief, even though they waived their right to penalty phase juries at the time of the actual trial. In Mr. Silvia's case, the postconviction court even acknowledged *Mullens* on page three, footnote three, of

its order granting relief, and implicitly distinguished it in the final disposition.

Hurst relief is about the right to jury fact-finding and the right to a unanimous jury for cases final after *Ring v. Arizona,* 536 U.S. 584 (2002) was decided. See *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Mr. Silvia never waived his right to a penalty phase jury, his case was final well past *Ring*, his jury was denied their fact-finding duties in violation of Mr. Silvia's Sixth Amendment rights, and he was sentenced to death based on a non-unanimous jury recommendation in violation of his Sixth and Eighth Amendment Rights, and his rights under the Florida Constitution. Mr. Silvia properly and timely raised his *Hurst* claim the first time it was made available to him. He could not waive a right that did not exist at the time of his initial waiver. *Mullens* and *Brant* are not applicable to the case at bar.

The State attempts to find support in regards to two cases that similarly involve waiver at the postconviction level, *James v. State*, 974 So.2d 365 (Fla. 2008) and *Trease v. State*, 41 So.3d 119 (Fla. 2010). The trial court's order clearly addresses how those cases are distinguishable as follows:

> As an initial matter, the State asserts that the Defendant should be precluded from seeking relief under the Hurst rulings because he waived his initial postconviction proceedings in this case. In support of its position, the State cites to <u>James v. State</u>, 974 So. 2d 365 (Fla. 2008) and <u>Trease v. State</u>, 41 So. 3d (Fla. 2010). However, both of those cases involved a defendant's attempt to reinstate

> his postconviction proceedings after validly waiving those proceedings, whereupon the Florida Supreme Court concluded that a "mere change of mind is an insufficient basis for setting aside a previous waiver." James, 974 So. 2d at 366, 368; Trease, 41 So. 3d at 120-21. In the case a bar, the Defendant is not seeking to reinstate his previously waived postconviction proceedings because he has changed his mind. Rather he is seeking to avail himself of a newly established constitutional right, which has been held to apply retroactively. The Defendant could not knowingly and voluntarily waive a right he did not possess at the time of the waiver. Therefore, the Court finds that he is not precluded from seeking Hurst relief based upon his waiver of his initial postconviction proceedings.
> (R. p. 372-73).

More specifically, in *James*, the defendant had the opportunity to read and analyze claims written in his 3.851 motion and the evidentiary hearing was set. *James* at 366. Prior to the evidentiary hearing, James filed a pro se pleading expressing that he wanted to voluntarily dismiss his postconviction proceedings. *Id.* The court in *James* also elucidated another important fact pattern:

> The trial court subsequently held a hearing to determine whether James was competent and fully understood the consequences of dismissing the postconviction **motion** filed on his behalf. During the hearing, the trial court followed a procedure mandated by this Court to ensure that James understood the consequences of discharging counsel and withdrawing his postconviction motion. In essence, James was informed by the trial court that his actions would result in the waiver of any legal barriers to the State's ability to enforce the sentence of death. On April 22, 2003, the trial court entered an order discharging

> counsel and allowing James to withdraw his postconviction **motion**. *Id.* at 366. (Emphasis added)

Considering that James voluntarily waived claims, claims that he was apprised of by reading his actual motion, his case is clearly distinguishable from the case at bar. Mr. Silvia never had a motion filed when he waived. Unlike James, Mr. Silvia is not attempting to revive claims that he waived. There were no claims for Mr. Silvia to waive, and again, the *Hurst* matter was not waivable at the time, because the right to such relief did not exist.

In regards to *Trease*, the State's reliance is also misplaced. Unlike Mr. Silvia's case, the facts in *Trease* arguably demonstrate abuse of process and a convoluted procedural history. The court in *Trease* detailed his confusing legal journey as follows:

> In March 2001, Trease filed a pro se motion to waive postconviction counsel and postconviction proceedings. After holding a hearing and conducting a *Faretta*-type inquiry in May 2001, the trial court found Trease competent and discharged Trease's collateral counsel.
>
> In June 2002, Trease filed a motion in the trial court asking to reinstate his postconviction proceedings and authorizing current discharged counsel to represent him. In October 2002, the trial court granted the motion and reinstated Trease's postconviction motion. During the reinstated postconviction proceedings, Trease again indicated a desire to waive postconviction counsel and proceedings. However, this time the trial court informed

Trease and counsel that it would not remove counsel until the postconviction motion was resolved. The trial court denied Trease's postconviction motion on May 9, 2007.

In July 2007, defense counsel filed a notice of appeal of the trial court's denial of the postconviction motion. And to date, counsel has filed an initial brief and a habeas petition in this Court. However, on April 22, 2008, Trease filed a pro se motion to discharge his counsel in the trial court, which the trial court dismissed for lack of jurisdiction.

On May 6, 2008, Trease filed an Emergency Motion to Dismiss Appellate Counsel and End All Further Appellate Review in this Court. Thereafter, on May 9, 2008, the State filed a motion to relinquish jurisdiction for the purpose of conducting a hearing as required by *Durocher v. Singletary,* 623 So.2d 482 (Fla.1993), and Florida Rule of Criminal Procedure 3.851(i). On June 19, 2008, this Court granted the State's motion and temporarily relinquished jurisdiction to the trial court to conduct the proceedings required by rule 3.851(i) and *Durocher.*

On October 2, 2008, the trial court held the *Durocher* hearing with Trease physically present in the courtroom. The trial court began by asking Trease about his background. Trease responded that he had completed the eleventh grade, that he read and spoke English, was fifty-five years old, had owned his own computer chip company, was not on medication, and had never been diagnosed with any mental disease or defect "except for when they're trying to win something in court." The trial court explained that Trease had three options: (1) allow counsel to continue with the postconviction proceedings; (2) proceed pro se; or (3) discharge counsel and waive postconviction relief. Trease stated that he wished to discharge counsel and waive postconviction proceedings.

Then, the following transpired:

Court: Why don't you tell me in your own words why it is that you want to have Mr. Dunn and Mr. Olive discharged and whether you want to abandon your post conviction proceedings.

Trease: Well, it's fairly simple. I'm essentially tired of living the life that I'm living, and I'm just not going to do it any longer, and these are the reasons. And be [sic] the Florida Supreme Court, I have the right to end my appeals.

Court: I understand that, but do you understand that if in fact you are successful in your post conviction proceedings, that that could end up in a-result in a new trial or a resentencing in your case?

Trease: Yes, I know all that, Judge.

Court: I know, but I have to ask you these questions.

Trease: Yes, I'm well aware of that and well aware of that I would more than likely win, seeing that I'm not guilty.

Court: Do you understand that if your lawyers are dismissed and your appellate review, your post conviction action is dismissed, that could result in waiver of any legal barriers to the State's ability to enforce the death penalty in this case.

Trease: Well aware of that, your Honor. Well aware of that.

Court: Do you understand your right to further appeal will be forever lost?

Trease: I also understand that.

Court: Are you aware that if the Court grants this motion, you may be barred from filing further pro se or self-represented petitions seeking review.

Trease: Yes, Judge, I do.

Court: Are you aware that your ability to file for release in federal court might be affected by dismissing the state court proceeding?

Trease: I'm well [aware] of that as well, Judge.

Court: In other words, this could basically mean that this case is over.

Trease: Yes, sir, I understand these things.

Court: This court does not recommend that you either discharge your counsel or abandon your post conviction proceedings. Notwithstanding that, do you also understand that you can represent yourself if you choose to do so?

Trease: I understand these things as well, Judge.

Court: Is your decision to dismiss your lawyers entirely voluntary on your part?

Trease: Yes, sir, it is.

Court: Is your decision to end appellate review entirely voluntary on your part?

Trease: Yes, it is.

When questioned by his counsel, Trease indicated that he was satisfied with his legal representation. And when counsel asked whether Trease had indicated to his counsel that he wanted to fight, Trease explained, "I told you I was going to fight because I[k]new once we got in front of a judge, had I not told you that, you would have come up with these lame excuses of him [sic] being retarded or brain damage or what they do at every trial." Trease also admitted that he had a good postconviction case.

During the *Durocher* hearing, defense counsel argued that,

> while Trease is intelligent and understands the proceedings, he suffers from organic brain damage and was abused by his father. Defense counsel stated that Trease will again change his mind as a result of the trauma in his childhood, his inability to regulate his emotions, and the harsh conditions of being under a continuous death warrant. Further, counsel stated that he had "questions" regarding Trease's competency.
>
> After the *Durocher* hearing, the trial court issued an order finding that (1) Trease is fully aware of all the consequences, (2) Trease is competent, and (3) Trease's decision to discharge counsel and dismiss all further proceedings is knowing, intelligent, and voluntary. Accordingly, the trial judge granted Trease's motion to dismiss counsel and end further appellate review. This appeal by discharged counsel followed as required by rule 3.851(i).
>
> On December 22, 2008, Trease filed in this Court a pro se motion to dismiss the appeal of the trial court's waiver order, arguing that discharged counsel lacked standing. But, after reading the initial brief filed by discharged counsel, Trease sent a letter to Tom Hall, the Clerk of this Court, stating: "I wish on this date-2-10-09 to go forward with my 3.850 and not give up my appeals." Thereafter, on February 25, 2009, this Court directed discharged counsel to address whether the trial court abused its discretion in granting Trease's pro se motion to waive postconviction counsel and proceedings and to address whether this Court should consider Trease's pro se letter dated February 10, 2009, which essentially asks this Court to reinstate postconviction proceedings.

Trease at 120-23. (internal footnotes omitted).

Mr. Silvia's case posture is nothing like the *Trease* case history, which

involved multiple changes of the mind over a near eight year period. Mr. Silvia never waived the right he is now taking advantage of, since it indisputably did not exist at the time. Also, this is the first time he has reasserted his right to litigate postconviction proceedings. The cases offered by the State are absolutely misplaced. This Court should not find any guidance from the State's legal position.

Relying on the State's misplaced case law in order to deprive Mr. Silvia of the rights he timely availed himself of, would violate constitutional principals in capital jurisprudence concerning reliability in sentencing and evolving standards of decency. If Mr. Silvia was under eighteen years old and previously waived his postconviction proceedings, he would not be precluded from seeking relief under the Eighth Amendment, pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005). Similarly, the Eighth Amendment forbids the execution of intellectually disabled individuals, and the prior waiver of postconviction relief would not then permit the State to kill an intellectually disabled defendant in violation of *Atkins v. Virginia*, 536 U.S. 304 (2002). Based on the State's analysis, if and when this state deems lethal injection to be unconstitutional under the Eighth Amendment, Mr. Silvia would be barred from seeking collateral relief under the new law. Also, according to Fla. R. Crim. Pro. 3.851 (g) (3), a defendant's competency can be determined at any stage of postconviction proceedings. However, based on the State's position, if Mr. Silvia

were ever to be found mentally incompetent while litigating a death warrant, he'd be precluded from stopping the State from killing a mentally incompetent man. It is important for this Court to prevent the promulgation of absurd and dangerous results, if cases such as *Trease* and *James* are stretched beyond their meaning.

II. PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THE TRIAL COURT'S RULING SHOULD BE AFFIRMED

The trial court's determination, *"Defendant could not knowingly and voluntarily waive a right he did not possess at the time of the waiver. Therefore, the Court finds that he is not precluded from seeking Hurst relief based upon his waiver of his initial postconviction proceedings."* (R. p. 373) is supported by the record and the law. A waiver cannot be done "knowingly," if the right did not exist at the time of the waiver. In *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. This Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty, require a unanimous jury fact- finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is

> the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that “the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg.” *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So.3d 40, 59–60 (Fla. 2016).

The Court cited to Eighth Amendment concerns finding 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." *Id.* at 54. (Emphasis in original). “In addition to the requirements of unanimity that flow from the Sixth

Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

This Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted)." *Hurst v. State,* at 60.

It is without dispute that Mr. Silvia was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a unanimous jury to ensure the reliability of his sentence. A mere recommendation of eleven to one would be inadequate under *Hurst v. State* and the new Florida statute Chapter 2017-1. To subject Mr. Silvia to the death penalty based on Florida's previous unconstitutional system when a non-unanimous jury advisory recommendation would today violate the United States and the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in

concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. Silvia is ensconced in a class of individuals who may not be subject to the death penalty. Mr. Silvia was sentenced to death without the reliability of jury fact-finding and unanimity. His death sentence violates the Sixth, Eighth and Fourteenth Amendments and his rights were never waived, as the *Hurst* rights did not exist during the time of which the State is relying upon as a valid "waiver." (R. 49-50).

When analyzing death penalty jurisprudence, it is important to begin with the premise that "death is different." *Yacob v. State*, 136 So.3d 539, 546 (Fla. 2014) (quoting *Fitzpatrick v. State*, 527 So.2d 809, 811 (Fla. 1988). "Death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991). In *Robertson v. State*, 143 So.3d 907 (Fla. 2014) this Court once again upheld the law that capital defendants in Florida must have their convictions and sentences subjected to appellate review, even over their objections and desire to argue in favor being put to death. According to *Robertson*,

> In 1988, this Court held that "even though [the defendant] expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the Legislature, and the courts." *Goode v. State,* 365 So.2d 381, 384 (Fla.1978). We recognized our obligation to "foster uniformity in death-penalty law" in *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991), and more recently, in *Yacob v. State,* 136 So.3d 539, 549 (Fla.2014), we reemphasized that the death penalty is reserved for only the most aggravated and least mitigated of cases. In that decision, we again noted our obligation to assure that the death penalty is not imposed in an arbitrary or capricious manner in this state and explained that our review is essential to the viability and validity of state law allowing for imposition of the death penalty in Florida. *See id.* at 546–47.
>
> …
>
> Our long-established precedent has given life to these constitutional and statutory safeguards against an unconstitutional capital sentencing scheme, even in cases where the defendant expresses a desire to be executed. In *Klokoc v. State,* 589 So.2d 219, 221–22 (Fla.1991), we denied the defendant's request to dismiss the direct appeal, stating that this Court required the benefit of an adversary proceeding to provide a meaningful review of both the judgment and the sentence. In *Ocha v. State,* 826 So.2d 956, 964 (Fla.2002), we explained that "*Klokoc* reiterates this Court's interest in ensuring that every death sentence is tested and has a proper basis in Florida law." The Court in *Ocha* also noted that a death-sentenced defendant may under certain circumstances waive his right to present mitigating evidence at trial "yet have appellate counsel appointed against his wishes." *Id*

Robertson at 908-10.

Ensuring that Mr. Silvia's death sentence must "foster uniformity in death-penalty law" and "has a proper basis in Florida law," *Id.* requires him receiving the benefit of *Hurst* relief, just like every other post-*Ring*, non-unanimous capital case that has been before this court. *If* this Court were to consider any of the jury waiver cases put forth by the State, in light of the fact that Mr. Silvia never had a legitimate fact-finding jury, in violation of *Hurst*, this Court should absolutely find guidance regarding the withdrawal of such a waiver from *Pangburn v. State*, 661 So.2d 1182 (Fla. 1995):

> In this case, the trial judge rejected appellant's withdrawal request because he found "no legal basis ... that would warrant the right to withdraw." Although the trial judge is to be commended for attempting to resolve an obviously untenable situation, we find that he applied the wrong standard in determining whether to grant appellant's request. As we noted in *Floyd:*
>
> > It would appear to us that the fundamental and cherished right of trial by jury will best be protected and be caused to "remain inviolate" if the withdrawal of the waiver to such a trial is refused by a court only when it is not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public.
>
> 90 So.2d at 106. Applying that liberal standard to the facts of this case, we find that the trial judge should have granted appellant's request to withdraw. The record reflects that the withdrawal request was made before appellant was sentenced, that it was not made to obtain a

> delay, and that no substantial harm would have been done by the granting of this request. In fact, a new penalty phase proceeding was one of the options initially presented to appellant. **Given that the right to a jury in the penalty phase proceeding is such a substantial right, we conclude that a new penalty phase proceeding is required under these circumstances.**

Id. at 1189. (emphasis added)

The fact that a jury trial is more costly to the State, is no ground for refusing a defendant the right to withdraw his waiver of a jury trial. *Floyd v. State,* 90 So.2d 105 (Fla. 1956). However, again, Mr. Silvia never waived his *Hurst* rights at any point. He also never waived his penalty phase jury. Mr. Silvia only offers *Pangburn* and *Floyd* to rebut the State's use of *Mullens* and *Brant*, and to further highlight the importance of the right to a penalty phase jury, which *Hurst* requires Mr. Silvia is entitled to; an actual fact-finding penalty phase jury.

Mr. Silvia never waived the relief that *Hurst* mandates he deserves as a constitutional right. The cases relied on by the State are inapplicable and distinguishable to this appeal. The monumental decision, *Hurst v. State*, has applied Eighth Amendment principals to make sure the most serious of punishments, death, is not pursued in an arbitrary and wanton fashion. Evolving standards of decency, interpreted by this Court's bend towards justice, makes Mr. Silvia eligible for another chance to gain the redemptive qualities of life. The lower court's decision

should be affirmed.

CONCLUSION

The postconviction court's finding of relief pursuant to *Hurst* and consequent decision to grant a new penalty phase proceeding, is amply supported by competent substantial evidence, consistent with state and federal law, and should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of June 30, 2017, I electronically filed the foregoing Answer Brief of Appellee with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Vivian Singleton, Assistant Attorney General Vivian.Singleton@myfloridalegal.com CapApp@myfloridalegal.com. I further certify that a copy has been furnished by U.S. Mail to, William Silvia DOC#512579, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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