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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-445

Lower Tribunal: 1976-CF- 1942

JAMES E. HITCHCOCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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ARGUMENT I AND II

THE ERROR IN MR. HITCHCOCK'S CASE WAS NOT HARMLESS AND TO THE EXTENT THAT RETROACTIVE APPLICATION IS NECESSARY, THIS COURT SHOULD FIND THAT *HURST V. FLORIDA* AND *HURST V. STATE* ARE RETROACTIVE TO ALL OF MR. HITCHCOCK'S CLAIMS BECAUSE DENYING MR. HITCHCOCK RELIEF BASED ON NON-RETROACTIVITY VIOLATES MR. HITCHCOCK'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The errors in Mr. Hitchcock's case were not harmless, not procedurally barred from relief, and continue to deny Mr. Hitchcock's rights under the Florida Constitution and United States Constitution. Retroactivity should not prevent this Court from granting Mr. Hitchcock a constitutional penalty phase trial.

1. The constitutional errors in Mr. Hitchcock's case were not harmless because the State could not obtain a unanimous recommendation and the errors denied Mr. Hitchcock a fair opportunity to obtain a life sentence.

The State was unable to obtain a unanimous advisory panel recommendation despite having all the unconstitutional advantages of Florida's pre-*Hurst* death penalty scheme. Moreover, the State was unable to obtain a unanimous recommendation even without the advisory panel hearing the full extent of Mr. Hitchcock's organic brain damage and other mitigation.

The State has the burden of proving that the errors in Mr. Hitchcock's case were harmless beyond a reasonable doubt. The State cannot meet its burden. This Court has repeatedly found that the Sixth Amendment error of *Hurst v. Florida,* 136 S.Ct. 616 (2016)

was not harmless in non-unanimous post-*Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) cases.

Mr. Hitchcock raised other issues based on the *Hurst* decisions and the implications therefrom. Some of these issues, all discussed below and in the initial brief, involve the Eighth Amendment. The State is never allowed to carry out cruel and unusual punishment or arbitrary and capricious punishment and thus such error is never harmless.

Harmless error is not an issue - - the issue is whether this Court will allow the harm that Mr. Hitchcock has suffered in violation of the United States and Florida Constitution to remain.

2. Under State and Federal law, *Hurst* and *Hurst v. State* require retroactive application to Mr. Hitchcock's case.

Federal standards of retroactivity applied by this Court require retroactive application of *Hurst v. State,* 202 So.3d 40 (Fla. 2016) and *Hurst v. Florida*. Under Federal retroactivity law, a new case is applied retroactively if it is of the nature that the Constitution demands that it be applied retroactively. *See Welch v. United States*, 136 S.Ct. 1257, 1264 (2016). There is no partial retroactivity under Federal law. The United States Supreme Court's decision in *Hurst v. Florida* and this Court's decision in *Hurst v. State* showed that Florida's previous death penalty scheme was unconstitutional under the United States and Florida Constitution. The rights in question, however, have always been

the rights of individuals regardless of whether the courts have recognized them. *Hurst v. State* placed it beyond the State's power to punish those who did not have a jury that unanimously found all of the facts necessary for a death sentence. *See Id*. *See also Falcon v. State*, 162 So.3d 954, 961-63 (Fla. 2015).

Mr. Hitchcock did not just raise the violation of his Sixth Amendment right to counsel under *Hurst v. Florida* and *Ring v. Arizona.* He also raised the violations of his State and Federal constitutional rights under *Hurst v. State,* and the violations of his rights that became apparent when some individuals received new trials to take place under a constitutional system. Perhaps if Mr. Hitchcock were seeking Federal habeas review of a State court decision concerning the procedure that Florida followed, the State's argument on procedural rights and retroactivity would be debatable. Mr. Hitchcock has raised much more than that, which requires further retroactivity review from this Court.

Hurst and *Hurst v. State* removed from the class of individuals subject to the death penalty, those who have not received a jury trial at which the State meets its burden of proof beyond a reasonable doubt on all of the requirements detailed by this Court. In penalty phases after *Hurst v. State*, whether or not they are the result of *Hurst* relief, a jury will determine if an individual is placed in the class that is subject to the death penalty. An individual cannot be placed in this class without the critical

findings made by a jury. Similar to when the United States Supreme Court found that an individual cannot be subject to the death penalty when that person has not been convicted of murder, an individual cannot be subject to the death penalty without unanimous findings of fact by a jury.

Unlike a mere procedural issue in a particular case, whether an individual is subject to the death penalty is part of an overall death penalty system in Florida that must narrow the death penalty to the most aggravated and least mitigated of cases. Partial retroactivity removes cases that may be more aggravated and less mitigated if the state does not seek death or fails to obtain a unanimous jury verdict. This is not merely procedural but is substantive and goes to the heart of whether Florida's death penalty is constitutional.

The right to a jury trial, when considered with the right to unanimity and the right to proof beyond a reasonable doubt, must be considered with the necessity that the death penalty be limited to the most aggravated and least mitigated of cases. After this Court's decision in *Hurst v. State* and its effects, the rights at issue are substantive. Subsequent to the *Hurst* decisions and the application of those cases across Florida's death penalty scheme, much broader issues have arisen. As it stands now, there is no rational basis for one individual to remain sentenced to death while another faces a retrial.

This Court must follow Federal law on retroactivity and must apply its own retroactivity law constitutionally. See *Montgomery v. Louisiana*, 136 S.Ct. 718, 725 (2016). The State argues that Mr. Hitchcock is not entitled to relief under Florida retroactivity law because Mr. Hitchcock's case is "distinguishable" from *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). (AB at 21). There is no way to meaningfully distinguish between Mr. Hitchcock's case and Mr. Mosley's. A calendar date will not suffice. Mr. Hitchcock and Mr. Mosley were both sentenced to death without the constitutional protections that the United States Supreme Court and this Court have found necessary to a constitutional death sentence.

Unlike Mr. Hitchcock at this point, Mr. Mosley will receive a full jury trial with all of the protections of *Hurst v. State* complete with specific detailed fact-finding made by a jury, not a judge. A unanimous jury is the greatest and most trustworthy of fact-finders. A jury will consider all of Mr. Mosley's evidence and argument for mitigation and consider all of his arguments against aggravating factors. As far as aggravating factors and the ultimate decision to impose death, an actual jury will make its decisions under the highest standard of all, proof beyond a reasonable doubt and return a *unanimous* verdict. Being tried today, Mr. Mosley will have counsel to present mitigation with today's understanding of mitigation and its role in sentencing. Mr. Mosley will have a jury to decide whether his case is one of the most

aggravated and least mitigated, which is a question well beyond the Sixth Amendment.

Mr. Hitchcock raised his claim under *Ring* and later under *Hurst v. Florida* within the time limits that are imposed on those sentenced to death in Florida. The State's argument that Mr. Hitchcock's case differs from Mr. Mosley's case because he "did not raise a *Ring*-like claim at his first opportunity" (AB 21) is incorrect. The State's brief ignores the fact that *Ring* was issued after Mr. Hitchcock's case became final. That is not a failure on the part of Mr. Hitchcock because he could not raise a claim based on *Ring* until there was a *Ring* case upon which to do so. Mr. Hitchcock acted timely and in good faith and asserted his rights under *Ring*, and later *Hurst v. Florida* and *Hurst v. State*.

Ring and the *Hurst* cases gave Mr. Hitchcock the authority to seek relief, but the fact remains that at the time Mr. Hitchcock was denied these rights, his death sentence was obtained in violation of the United States and Florida Constitutions. He possessed these rights regardless of whether any court had acknowledged that Mr. Hitchcock had these rights. This Court should not deny him a remedy.

The State's argument that Mr. Hitchcock "cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*" (AB 28) fails to consider that if Mr. Hitchcock's

advisory panel were an actual jury, a 10-2 verdict would have led to a life sentence under *Hurst v. State*. If the State wants to rely on the advisory panel's recommendation in Mr. Hitchcock's case, Mr. Hitchcock should be sentenced to life. The State's argument fails to consider that a unanimous verdict is much harder for the State to obtain than the 10-2 in Mr. Hitchcock's case. The lack of unanimity itself defeats any argument that Florida's pre-*Hurst* system is as reliable as a post-*Hurst* jury trial. In Mr. Hitchcock's case, the State had every advantage in its favor under Florida's unconstitutional system, and still was unable to obtain a unanimous recommendation. Cases in which 12 jurors make all of the necessary finding of facts for a death sentence will have the most reliable determination of whether a case is one of the most aggravated and least mitigated. Mr. Hitchcock's death sentence is unreliable and must not stand.

The United States Supreme Court's decision in *Hurst v. Florida* addressed only the error in that single case, Mr. Hurst's case. It did not address the implications and consequences of the Court's decision to the overall death penalty in Florida on all cases. Based on the same reasoning that this Court employed in *Hurst v. State* and *Mosley*, those rights should apply retroactively here.

3. Mr. Hitchcock is also entitled to retroactive application of both *Hurst* decisions because his sentence became final after *Apprendi.*

Fundamental fairness bears even more significance in this

case where Mr. Hitchcock's conviction and sentence were final before *Ring* but after *Apprendi v. New Jersey,* 530 U.S. 466 120 S. Ct. 2348(2000). The State's answer does not take into account Mr. Hitchcock's special posture as a post-*Apprendi* case. Because both *Ring* and *Hurst* are extensions of the law set forth in *Apprendi*, this Court should, at a minimum, apply the *Hurst* cases retroactively to Mr. Hitchcock's case which became final after *Apprendi*.

Apprendi established that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. In *Ring*, the Supreme Court applied *Apprendi*'s analysis to conclude that Ring's death sentence violated his right to a jury trial because the judge's fact-finding "exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Hurst v. Florida*, 136 S.Ct. at 621. The Court explained, "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589.

Later, in *Hurst v. Florida*, the Supreme Court extended the *Apprendi* analysis to Florida's sentencing scheme. *Id.* at 622. Just as *Ring* had applied *Apprendi*'s principles to Arizona's unconstitutional capital sentencing scheme, *Hurst* applied

Apprendi's principles to Florida's unconstitutional capital sentencing scheme. In *Ring*, the United States Supreme Court had overturned pre-*Apprendi* precedent that had previously found Arizona's capital scheme constitutional. *Ring*, 536 U.S. at 609. Then, in *Hurst*, the Supreme Court applied the *exact same rationale* to Florida's capital sentencing scheme and overturned pre-*Apprendi* precedent finding Florida's capital scheme constitutional. *See Hurst*, 136 S.Ct. at 623. It explained:

> *Spaziano* [*v. Florida*, 468 U.S. 447 (1984),] and *Hildwin* [*v. Florida*, 490 U.S. 638 (1989),] summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin*, 490 U.S. at 640-41. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton* [*v. Arizona*], 497 U.S. 639 (1990)—could not 'survive the reasoning of *Apprendi*.' [*Ring*,] 536 U.S. at 603.

Hurst, 136 S.Ct. at 623. Thus, *Ring* relied on *Apprendi* to clarify these constitutional guarantees in capital cases, and the same was true in *Hurst*. Rather than a line from *Apprendi* to *Ring* to *Hurst*, *Ring* and *Hurst* both derive from *Apprendi*.

In the past, this Court relied on the pre-*Apprendi* precedent referred to by the United States Supreme Court in *Hurst*. Before *Hurst v. Florida*, this Court rejected *Apprendi* in *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), where Mills claimed that Florida's capital sentencing scheme violated the Sixth Amendment principles

set forth in *Apprendi*. The Court wrote, "Because *Apprendi* did not overrule *Walton [v. Arizona*, 497 U.S.639 (1990)], the basic scheme in Florida is not overruled either." *Id*. at 538. This Court later relied on *Mills* in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

It is fundamentally unfair to deny relief to Mr. Hitchcock because Mr. Hitchcock's death sentence was final - - after *Apprendi* but before *Ring*. Failing to apply *Hurst* to Mr. Hitchcock's post-*Apprendi* death sentence solely because it was final before *Ring* is arbitrary and violates fundamental fairness. *See Mosley v. State*, 209 So. 3d 1248, 1274-75 (Fla. 2016).

This arbitrariness is more apparent when considering that other cases pending before this Court around the same timeframe as Mr. Hitchcock's have since been granted *Hurst* relief. For example, in *Card v. Jones*, No. SC17-453, 2017 WL 1743835 (Fla. May 4, 2017), the defendant filed his direct appeal brief in August 2000, barely more than a year after Mr. Hitchcock had filed his initial brief. Briefing was complete by September 1999 in Mr. Hitchcock's case, and by January 2001 in *Card*.

By the State's logic, this sixteen-month gap is the sole factor determining entitlement to *Hurst* relief in these cases because just *after* a decision was rendered in Mr. Hitchcock's case but just *before* a decision was rendered in *Card*, the United States Supreme Court decided *Ring*. In fact, the conviction in *Card* was

final *a mere four days* after the United States Supreme Court decided *Ring*. This Court recently found *Hurst* retroactive in Card's case and granted relief. *Id.* at *12. Under the *Ring* cut-off, Card would not have received relief if the Supreme Court had denied certiorari in his case one week earlier.

On the other hand, had Mr. Hitchcock's case faced a delay for any reason, he too may have fallen into the post-*Ring* category. Indeed, Mr. Hitchcock's appeal was only pending before this Court for less than a year after all briefs had been submitted, not counting the motions for rehearing. Had this Court taken as long in his case as it has in other capital cases, *see e.g.*, *Hall v. State*, 201 So. 3d 628 (Fla. 2016) (Florida Supreme Court released its opinion twenty-three months after the last brief was submitted); *Oats v. State*, 181 So. 3d 457 (Fla. 2015) (Florida Supreme Court released its opinion two and a half years after the last brief was submitted), his conviction would have been final after *Ring*. Thus, by chance and timing, Mr. Hitchcock's sentence became final after the Supreme Court precedent requiring a jury finding for all elements exposing defendants to a more severe sentence but just before the Supreme Court clarified that this constitutional protection does in fact apply to the death penalty. Contrary to the State's assertion that there is nothing unfair about denying relief in this case, to do so would obliterate the fundamental fairness doctrine.

Under *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Mr. Hitchcock, especially because his sentence became final after *Apprendi*. *See Mosley*, 209 So.3d at 1276 n.13. Mr. Hitchcock is entitled to relief under *Hurst*.

Finally, to deny Mr. Hitchcock relief based on the date of *Ring* while granting relief to those cases that had not become final based on *Asay v. State*, 210 So.3d 1 (Fla. 2016) and *Mosley* would violate Mr. Hitchcock's right to Equal Protection under the Fourteenth Amendment of the United States Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

ARGUMENT III

MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST,* PRIOR PRECEDENT, AND SUBSEQUENT DEVELOPMENTS, BECAUSE MR. HITCHCOCK WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.

Mr. Hitchcock's death sentence was obtained in violation of *Hurst*, *Hurst v. State,* and *Ring*. He had no jury for penalty phase that made the unanimous fact-finding that this Court has found constitutionally necessary in *Hurst v. State*. The State's brief confuses previous denials of relief with the nonexistence of rights. It took a line of cases from *Apprendi* to *Hurst* to this Court's decision in *Hurst v. State* for the right to a jury trial to be fully recognized for the finding of fact necessary to subject

an individual to death. The right to a jury trial has long existed in this State and throughout the history of the United States. *Hurst* did not create a new right; it vindicated a right that has been essential to human dignity and fairness throughout the history of Florida and the United States.

In modern times, some states and Florida in particular, have hidden fact-finding behind sentencing factors to deny the essential power which the State and Federal Constitutions rest solely in the power of the community that comes together in the form of a jury. In the wake of *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726 (1972) Florida's response was to secrete the essential fact-finding that should have been made by a jury, behind an elaborate procedure that severed Florida's death penalty from the authority of the community. A collection of individuals instructed that their role was to offer an advisory recommendation that in no way captures each member's specific findings or required unanimity was not a jury.

The right to a jury trial is fundamental to the exercise of the authority of the state in a democracy. A jury made up of the people that exercise the moral authority of the community must make the decisions that allow the State to deny liberty and to deny life. It is not for the courts or the prosecutors to decide. This Court correctly detailed the importance of a jury and a unanimous jury verdict in *Hurst v. State* throughout the history of

Florida and the history of the Common Law. See *Hurst v. State*, 202 So.3d at 53–58.

A jury trial also provides the proper respect for the dignity of an individual because it requires the highest level of accurate fact-finding that is possible. The most experienced and learned judge is no match for the collective wisdom and experience of 12 members of the community coming together in a deliberative process to decide the important questions of the death penalty. Even with the most aggravated of murders, a fair and just system affords the dignity of a jury to the individual.

Mr. Hitchcock deserves no less. Retroactivity should not determine whether he receives the very basic right to a jury trial with a jury's proper exercise of the rights maintained by the people of this State.

ARGUMENT IV

THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST* AND SUBSEQUENT CASES. MR. HITCHCOCK'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.

The State may never impose or carry out cruel and unusual punishment. *Hurst* and this Court's decision in *Hurst v. State* have exposed the inherent and overt unconstitutionality of Florida's previous death penalty system. Mr. Hitchcock's death sentence stands now as a product of chance, not law. It is arbitrary, capricious, and contrary to evolving standards of decency.

Allowing retroactive application of *Hurst* and *Hurst v. State* avoids the violations of the Eighth Amendment that result from a retroactivity split based on the date that *Ring* was issued.

The State's answer misses the distinction between this Court finding that retroactive application of *Hurst* and *Hurst v. State* is necessary to avoid unfairness and unconstitutionality and an outright declaration that the death penalty violates the Eighth Amendment without regard to the events that have occurred in the wake of *Hurst*. The conformity clause of the Florida Constitution does not prohibit this Court from correcting the Eighth Amendment violations that have arisen since *this Court's* post-*Ring* retroactivity split. This Court always has had the power to rule whether a death sentence was proportional and has always had the power to allow retroactive application of a new case. If this Court may address such matters, this Court can grant new penalty phases to avoid rendering Florida's remaining death sentences unconstitutional.

When the United States Supreme Court issued *Hurst*, it declared that Florida's death penalty system was unconstitutional because the facts that subjected an individual to a death sentence were decided by a judge and not a jury. The Court left it to this Court to decide harmless error and the effects of *Hurst v. Florida* on prior cases in which an individual was sentenced to death and on future cases in which the State may seek death. The Supreme Court

did not write a new statute or determine retroactivity. It left decisions to this Court to make initially.

This Court has the unique vantage point of reviewing the day-to-day operations of Florida's death penalty scheme in practice, throughout the state and, over extended periods. This Court has not just the experience of each Justice serving on the bench but the institutional knowledge that comes with this Court's history. This Court is best able to consider all of the implications of *Hurst* and *Hurst v. State*.

If the retroactivity split based on *Ring* stands, Florida no longer has narrowed the death penalty to the most aggravated and least mitigated cases. The *Ring* split has left individuals with a death sentence because a court never found sufficient constitutional error to grant a post-*Ring* resentencing or because their case became final before *Ring*. There is nothing about the crime or the individual that maintains the pre-*Ring* defendants' condemned status. The *Ring*-split retroactivity is arbitrary and capricious because there is no meaningful distinction based on the culpability or severity of offense, rather, it is based on the mere date *Ring* was issued. Those fortunate enough to obtain a new penalty phase before a jury will have fuller and greater consideration of their mitigation.

Mr. Hitchcock's case shows how leaving behind the pre-*Ring* cases is also contrary to evolving standards of decency because

those fortunate to obtain a retrial will have a jury that will consider all available mitigation under a constitutional standard that favors the defendant. Mr. Hitchcock presented mitigation to the advisory panel in 1996 about his suffering trauma and deprivation during his youth. He witnessed brutal violence and was forced to leave home at 13 years of age. This was compelling mitigation, yet, was incomplete. Postconviction showed that beyond the important mitigation that was presented at trial, there was a great deal of critical neuropsychological mitigation that an actual jury should have heard. As Dr. Henry Dee's neuropsychological opinion established during the postconviction evidentiary hearing, Mr. Hitchcock was organically brain damaged. At a new trial before a jury, counsel would present Mr. Hitchcock's neuropsychological impairment as compelling mitigation to a jury.

With the evolving standards of decency, society and trial counsel's understanding of mitigation have evolved. Since Mr. Hitchcock's first trial, society has gained an understanding of how the brain develops, the effects of trauma during development, the infirmities of youth and neuropsychological impulsivity. The United States Supreme Court has provided a stream of cases that required previously-discounted mitigation to be considered and in some cases act as a bar to execution.

By splitting retroactivity based on *Ring*, this Court has left the cases that are more likely to have mitigation under

contemporary standards and understanding that was not presented at the earlier penalty phase. Beneficiaries of *Hurst* relief will have counsel that are versed in the latest science and understanding of mitigation that will present such mitigation to an actual jury. That jury will determine the existence of aggravating factors and whether those aggravating factors outweigh any mitigation beyond a reasonable doubt. Without a correction from this Court, Mr. Hitchcock and those still with death sentences will not have had the best case for mitigation presented to a jury with today's advanced understanding of mitigation.

The retroactivity split has left behind those pre-*Ring* individuals with less aggravated and more mitigated cases than those who are fortunate enough to have received *Hurst* relief and may receive life sentences under a constitutional jury trial. This Court should reverse.

ARGUMENT V

THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. HITCHCOCK TO THE DEATH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

Mr. Hitchcock received no jury trial for the penalty phase and thus no jury ever made the fact-finding necessary for him to be subject to the death penalty. Proof beyond a reasonable doubt is required in all criminal cases. This Court has found that,

> In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a

> reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So. 3d at 44. Thus are the facts that a jury must find in Florida for a death sentence. Beyond the finding of one or more aggravating factors, Florida has been and remains a weighing state. Even if an aggravating factor exists, it must be weighed against mitigation. Mr. Hitchcock had a great deal of mitigation presented at his last penalty phase, and there was a great deal more mitigation that was developed at his postconviction hearing.

The State argued “it is important to note that Appellant’s jury was specifically instructed that it had to find that the aggravating circumstances were proven beyond a reasonable doubt before rendering its verdict.” Then, the State argued, “Specifically, the jury was instructed that ‘[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.’ (PP4, V7: 368).” (AB at 50-51).

The State’s argument fails to take into account that the right to proof beyond a reasonable doubt encompasses the right to a jury returning a verdict based on the evidence beyond a reasonable

doubt. In the instant case, there was no penalty phase jury, let alone a unanimous jury. The advisory panel was told that its decision was a recommendation, and in particular to Mr. Hitchcock, that its "final decision as to what punishment shall be imposed is the responsibility of me the judge." (Vol. VII R. 363). The verdict and record in this case does not show any finding of proof beyond a reasonable doubt by even the advisory panel, unanimous or otherwise.

The advisory panel was instructed on four aggravating factors. An actual jury certainly could find a reasonable doubt that the State proved one or more of these aggravating factors. The first was that, "The crime for which James Hitchcock is to be sentenced was committed while he was under sentence of imprisonment or placed on community control." (Vol VII PPR. 366). Mr. Hitchcock was on parole from a prison sentence he received as a juvenile for a few structure burglaries. This aggravating factor was not weighed against him during the original penalty phase (see *Hitchcock v. State*, 413 So. 2d 741, 746 (Fla. 1982)) and ultimately became the subject of *ex post facto* challenges. While this aggravating factor may not have been in dispute factually, an actual jury or even this advisory panel certainly would not have attributed much weight to it compared to other cases in which this aggravating factor has been at issue.

The remaining aggravating factors are disputable. There is no

certainty that all 12 members of the advisory panel would have found that each of the remaining aggravating factors were proven beyond a reasonable doubt or that that they should be given substantial weight to overcome Mr. Hitchcock's mitigation. Indeed, it should be noted that on initial appellate review, Justice McDonald did not find "that the aggravating factor of especially heinous, atrocious, and cruel was proper." *Id*. at 748. Justice McDonald's dissent found that "This crime was not accompanied by such additional acts as to set the crime apart from the norm. It did not show a conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id*.

At Mr. Hitchcock's penalty phase the court went on to instruct that "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment. Should you find sufficient aggravating circumstances to exist, it will be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (Vol. VII PPR 367-68). This was not proof beyond a reasonable doubt. Under the proof beyond a reasonable doubt standard, the State and the State only, has the burden of proving its case beyond a reasonable doubt. That did not occur in Mr. Hitchcock's case because he had the burden of proving that mitigating circumstances exist that outweigh the aggravating circumstances.

Informing an advisory panel that they have to find an

aggravating factor beyond a reasonable doubt before they consider it in the weighing process, in the absence of a verdict from an actual jury is not the same as the State being held to the burden of proving each aggravating factor beyond a reasonable doubt. The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Under the United States and Florida Constitution, Mr. Hitchcock may not be sentenced to anything more than life without proof beyond a reasonable doubt of each aggravating factor, that the aggravating factors outweigh the mitigating factors, and that death should be imposed. Because proof beyond a reasonable doubt raises no retroactivity issues, this Court should grant relief.

ARGUMENT VI

IN LIGHT OF *HURST*, MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.

The Florida Constitution explicitly requires a grand jury. The grand jury serves as a shield for the individual from the government and is a necessary check on the unbridled exercise of prosecutorial power. It is as time honored as the right to a jury trial in Florida.

Had a grand jury actually considered the aggravating factors in Mr. Hitchcock's case, the grand jury may not have indicted on

capital murder and Mr. Hitchcock would not have faced the death penalty. Moreover, the grand jury may have found that the State was not authorized to proceed on one or more aggravating factors because they were not supported by sufficient evidence or were insubstantial.

This claim is not procedurally barred. The State relies on the argument that this Court has yet to recognize the necessity of a grand jury finding of the aggravating factors that *Hurst* has shown must be proved beyond a reasonable doubt to a jury that engages in the constitutionally required fact-finding. (See AB at 52). Each case cited by the State predates *Hurst* and *Hurst v. State*. There was no occasion to recognize the right to a grand jury indictment on the aggravating factors before *Hurst* because individuals in Florida were still being sentenced to death without a jury making the critical fact-finding that justified a death sentence.

The rights guaranteed by the United States and Florida Constitutions interact with the right to a jury trial to ensure that an individual may fully exercise the right to a jury trial. While each right guaranteed by the Florida Constitution and United States Constitution is independent, all of the rights operate together to provide for a fair trial and a just outcome in a criminal case.

When one right is finally recognized, the courts must

recognize other rights as well. For example, the United States Supreme Court decided *Strickland v. Washington,* 466 U.S. 668(1984) after *Gideon v. Wainwright,* 372 U.S. 335 (1963). The right to the effective assistance of counsel followed necessarily from the recognition of the right to counsel in *Gideon*. Likewise, the right to a grand jury indictment under the Florida Constitution necessarily follows recognition of the rights in *Hurst* and *Hurst v. State*.

ARGUMENT VII

THIS COURT'S DENIAL OF MR. HITCHCOCK'S POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

Hurst and *Hurst v. State* have rendered previously raised claims of constitutional violation more egregious when viewed under a constitutional system. The errors that were unremedied or tolerable should no longer remain so. Mr. Hitchcock's previous postconviction claims were all properly raised.

Mr. Hitchcock's brief drew attention to his previously raised *Ring* claims and his previously raised *Caldwell* claims. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Mr. Hitchcock raised trial counsel's ineffectiveness in failing to object to the trial court's deviating from even the standard jury instruction and appellate counsel's failure to raise this issue on appeal. He also raised numerous other claims of ineffective assistance of counsel that directly affect the reliability and justification of his death

sentence. None of these claims were decided in the context of a constitutional system in which a jury was required to make the necessary fact-finding to impose death.

The State's noting, "that *Hurst* did not receive a new postconviction proceeding" (AB at 54) misses a critical distinction - - Mr. Hurst received relief; Mr. Hitchcock did not. All of the unconstitutionality in Mr. Hurst's case and other cases in which relief was granted, was cured with a the remedy of a new jury trial on penalty that will now be held under constitutional standards. Mr. Hurst and the others had no need for postconviction relief after their cases became final because they are no longer sentenced to death from those proceedings. Following *Hurs*t and the subsequent decisions of this Court, Mr. Hitchcock's case is further removed from a constitutional death sentence because the previous error has accumulated with all of the *Hurst* related error. He deserves at least review of his previous postconviction claims.

CONCLUSION

The *Ring* retroactivity split creates a terrible dichotomy that renders Mr. Hitchcock's death sentence unconstitutional. No meaningful distinction based on the facts of Mr. Hitchcock's case supports a denial of relief. The denial of a remedy based on the date of *Ring* renders the errors unconstitutional beyond what should be tolerated. This Court should reverse.

CERTIFICATE OF SERVICE

We certify that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Reply Brief on Tayo Poopola, Assistant Attorney General on this 3rd day of July, 2017.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Reply Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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