IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-593

LOWER TRIBUNAL No. 89-CF-966

DANIEL JON PETERKA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Peterka's successive motion for postconviction relief, which was based upon the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the subsequent developments relating to Florida's death penalty jurisprudence and sentencing statute. The motion was brought pursuant to Fla. R. Crim. P. 3.851.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court;

"PCR" -- record on appeal from the initial denial of postconviction relief;

"T" -- transcript of the evidentiary hearing;

"PCR2" -- record on appeal from the denial of Mr. Peterka's first successive motion for postconviction relief.

"PCR3" -- record on appeal from the denial of Mr. Peterka's second successive motion for postconviction relief.

"PCR4" -- record on appeal from the denial of Mr. Peterka's third successive motion for postconviction relief.

REQUEST FOR ORAL ARGUMENT

Mr. Peterka has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Peterka, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The issue presented in this appeal concerns the effect of *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and Chapter 2017-1 on Mr. Peterka's sentence of death. The issues are questions of law and must be reviewed *de novo*. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

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STATEMENT OF THE CASE

On August 10, 1989, Mr. Peterka was indicted and charged with premeditated first-degree murder in Okaloosa County, Florida (R. 1947-8).

Trial began on February 26, 1990, and on March 2, 1990, the jury found Mr. Peterka guilty of first-degree murder (R. 2042).

The penalty phase was held the following day, and on that same day, the jury returned a recommendation of death (R. 2043). The jury recommended that Mr. Peterka be sentenced to death by an eight to four vote (R. 1930).

A sentencing hearing was held on April 25, 1990. The trial court sentenced Mr. Peterka to death (R. 2077-8).

Though identifying numerous errors, on direct appeal, this Court affirmed Mr. Peterka's conviction and sentence. *Peterka v. State*, 640 So. 2d 59 (Fla. 1994).

Following his direct appeal, Mr. Peterka filed a series of Rule 3.850 motions (PC-R. 1-148, 290-336, Supp. PC-R. 168-9). The circuit court ordered that an evidentiary hearing be held, but limited the claims to allegations of ineffective assistance of trial counsel (PC-R. 465-6).

On June 28-29 and July 16, 2001, an evidentiary hearing was held. On May 2, 2002, the circuit court denied Mr. Peterka's Rule 3.850 motion (PC-R. 569-92).

This Court affirmed the denial of relief. *Peterka v. State*, 890 So. 2d 219 (Fla. 2004). This Court also denied Mr. Peterka's petition for writ of habeas corpus. *Id.*

Mr. Peterka filed a petition for writ of habeas corpus in federal district court. On March 29, 2007, the federal district court denied the petition.

Mr. Peterka's was granted a certificate of appealability as to one claim – whether trial counsel was ineffective at his capital penalty phase. The Eleventh Circuit Court of Appeals affirmed the denial of relief. *Peterka v. McNeil*, 532 F.3d 1199 (11th Cir. 2008). The United States Supreme Court denied certiorari on January 26, 2009. *Peterka v. McNeil*, 129 S.Ct. 1039 (2009).

In addition, Mr. Peterka filed a successive Rule 3.851 motion on or about March 10, 2008. On June 26, 2008, the circuit court summarily denied Mr. Peterka's motion.

Mr. Peterka appealed to this Court. On July 23, 2009, this Court denied relief in an order. *Peterka v. State*, Florida Supreme Court Case No. SC08-1413 (Fla. July 23, 2009).

On April 26, 2010, Mr. Peterka filed a *pro se* petition for writ of habeas corpus before this Court. On November 15, 2010, by court order, this Court denied relief. *Peterka v. McNeil*, Florida Supreme Court Case No. SC10-801 (Fla. Nov. 15, 2010).

On or about November 19, 2010, Mr. Peterka filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 558

U.S. 30 (2009)(PC-R2. 1-27). On December 1, 2010, the State responded and, in a separate pleading, moved to strike the motion (PC-R2. 28 - 54 and 55 - 59).

On June 15, 2011, the circuit court denied Mr. Peterka's motion. Mr. Peterka appealed to this Court.

After briefing, on April 26, 2012, this Court denied all relief. *Peterka v. State*, 77 So. 3d 639 (Fla. 2011).

On May 23, 2014, Mr. Peterka filed a successive Rule 3.851 motion based upon *Trevino v. Thaler*, 133 S.Ct. 1911 (2013)(PC-R3. 1-26).

On June 2, 2014, the circuit court dismissed Mr. Peterka's Rule 3.851 motion (PC-R3. 35-37), and later denied the motion for rehearing on June 23, 2014 (PC-R3. 43-44).

After briefing, on January 23, 2015, this Court denied all relief. *Peterka v. State*, Supreme Court Case No. SC14-1516 (Fla. 2015).

On January 4, 2017, Mr. Peterka filed a successive Rule 3.851 motion based upon *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and other cases related to Florida's death penalty scheme (PC-R4. 1-43).

After the State responded and a case management conference was held, the circuit court denied Mr. Peterka's Rule 3.851 motion (PC-R4. 81-85).

Mr. Peterka filed a timely notice of appeal (PC-R4. 112-113).

STATEMENT OF THE FACTS

At Mr. Peterka's jury trial, the State maintained that Mr. Peterka was guilty of the premeditated first-degree murder of John Russell. The State told the jury that Mr. Peterka executed his roommate in order to assume his identity because Mr. Peterka was a fugitive from Nebraska and did not want to serve his sentence of two consecutive one year terms of incarceration that resulted from his felony convictions of theft and retaining stolen property (R. 1119-20).

At trial, the State presented testimony that Mr. Peterka was convicted of theft and retaining stolen property on February 10, 1989, in Scottsbluff, Nebraska (R. 1135-6). He was required to report to a Nebraska penitentiary two days later (R. 1135-6). On the day Mr. Peterka was supposed to report to begin serving his sentence, he spent the morning with his girlfriend, Cindy Rush (R. 1144). Mr. Peterka told Rush that he did not want to report to prison that he "couldn't handle the things there", "it would be rough there" (R. 1150). He told her that he wanted to reestablish himself somewhere else, get a job and work (R. 1148).

Thereafter, Mr. Peterka arrived in Okaloosa County and was employed at the Okaloosa Plaster and Supply Company, the business of Ruben Purvis (R. 1671). For a short time, Mr. Peterka lived with Ronald and Connie LeCompte and their children (R. 1572).

While living with the LeComptes, Mr. Peterka asked Mr. Lecompte to purchase a handgun in his name for Mr. Peterka (R. 1573). LeCompte purchased a handgun for Mr. Peterka (R. 1573).

When the LeComptes were forced to move from their home, farther from Mr. Peterka's job, Mr. Peterka looked for another place to live (R. 1879).

The Purvises also owned rental properties and knew that one of their tenant's, Mr. Russell, was behind in his rent (R. 1656). Mr. Purvis suggested that Mr. Peterka and Mr. Russell share the rental house together so that Mr. Peterka could be closer to work and Mr. Russell could catch up on his rent payments (R. 1656). Mr. Peterka moved into the house in May, 1989 (R. 1649).

When Mr. Peterka paid his first month of rent to Mr. Russell, Mr. Russell spent the money and did not pay the Purvises (R. 132). Thereafter, Mr. Peterka paid his share of the rent directly to Jean Purvis. Mr. Russell not only failed to pay the rent, but also failed to pay the utility bills (R. 132).

On June 27, 1989, Mr. Peterka cashed a $300.00 check that was sent to Mr. Russell from his aunt (R. 2445).

That same day, Mr. Peterka obtained a drivers license from the Department of Motor Vehicles which had his photograph and Mr. Russell's identifying information on it (R. 2445). Mr. Peterka told the police in his confession that he had paid Mr. Russell $100.00 for use of his social security card so that he could obtain a driver's license (R. 2446).

Mr. Russell learned of the check that his aunt had sent him and believed that Mr. Peterka had stolen the check (R. 1445). The jury was allowed to hear testimony that Mr. Russell told his friend, Lori Slotkin, his cousin, Deborah Trently, and a bank employee, Kim Cox, that he would not confront Mr. Peterka about the check (R. 1434, 1457, 1604-5).

On July 13, 1989, Mr. Russell did not appear for work (R. 1276). His friend, Gary Johnson, was nervous because it was pay day and Mr. Russell usually came to work on pay day to collect his paycheck (R. 1276). Johnson traveled to Mr. Russell's house and entered the house through a window (R. 1280). Johnson saw Mr. Russell's car keys, cigarettes and eye glasses in the house (R. 1281). Johnson told the jury that Mr. Russell was so financially strapped that he was surprised to see that Mr. Russell had left a pack of cigarettes with a few cigarettes in the pack at the house (R. 1281).

After work, Johnson went back to Mr. Russell's house and spoke to Mr. Peterka who was home with his girlfriend, Frances Thompson (R. 1285). Mr. Peterka told Johnson that Mr. Russell left the house the previous evening with another individual (R. 1285).

Later that afternoon, Johnson and Slotkin filled out a missing persons report and spoke to Deputy Daniel Harkins of the Okaloosa County Sheriff's Department (R. 1288). Deputy Harkins traveled to Mr. Peterka's house along with Johnson and Slotkin

(R. 1289, 1350). Deputy Harkins interviewed Mr. Peterka, who again stated that Mr. Russell left the house the previous evening with another individual (R. 1352). Deputy Harkins requested identification and Mr. Peterka provided his birth certificate (R. 1353).

After Deputy Harkins left, Mr. Peterka told Thompson that she should leave because the police would be back to arrest him due to his fugitive status in Nebraska (R. 1629). Thompson left the house (R. 1629).

At approximately 1:30 a.m., on July 14, 1989, Deputy Harkins and other law enforcement officers returned to the house to arrest Mr. Peterka on a fugitive warrant from Nebraska (R. 1355). During Deputy Harkins testimony, he was allowed to tell the jury that the teletype of the warrant stated that Mr. Peterka was "armed and dangerous" (R. 1355). He was also allowed to testify that the officers believed Mr. Peterka may have weapons in the house (R. 1361).

After arresting Mr. Peterka outside of his home, the officers entered and searched Mr. Peterka's home. While inside, one of the officers looked in Mr. Peterka's wallet and found: approximately $407.00, a Florida driver's license with Mr. Peterka's picture and Mr. Russell's name; Mr. Russell's social security card, video card, bank card and insurance card, Mr. Peterka's Nebraska driver's license and birth certificate and a

clipping for a job in Alaska (R. 1369-72). The contents of the wallet were introduced as evidence (R. 1374).

The officers also located a handgun, for which Mr. Peterka produced a bill of sale (R. 1364-5). The officers did not take custody of the handgun at that time (R. 1366).

On July 18th, 1989, in the late afternoon, Investigator Vinson interviewed Mr. Peterka (R. 246). Mr. Peterka asked Inv. Vinson to arrange a phone call with Purvis (R. 250). Mr. Peterka spoke to Purvis and requested that he come to the jail to meet with Mr. Peterka that evening (R. 1674). Alan Atkins, an officer at the jail, agreed to allow Purvis to meet with Mr. Peterka (R. 1661).

When Purvis arrived at the jail, Mr. Peterka was upset and crying and confessed to Purvis that he shot Mr. Russell (R. 1676-8). Purvis asked Officer Atkins to enter the room and Officer Atkins instructed both Purvis and Mr. Peterka to write down what Mr. Peterka had told Purvis about his roommate (R. 1680).

Later that evening, Inv. Vinson and Sheriff Gilbert arrived and spoke to Mr. Peterka (R. 1323). Mr. Peterka confessed to shooting Mr. Russell and explained what happened on the late afternoon of July 12th. Mr. Peterka agreed to show law enforcement where he placed Mr. Russell's body (R. 1323).

After leading law enforcement to Mr. Russell's body, Mr. Peterka returned to the police station and provided a videotaped

statement about what had occurred on July 12, 1989 (R. 2441-57).

The jury watched and heard the entire videotaped confession:

> Q: Dan, what I want you to do, or what I would like for you to do is start on Wednesday, the 12th, what happened when your roommate, John Russell came in – came in from work?
>
> A: He came in through the front door, appeared to be a little bit upset. I didn't say much. Said, "howdy", pretty much the usual greeting, I guess. He just was acting kind of strange and that – just started wanting to know about some money and that. I asked him what he was talking about and he got to screwing around. I got up and walked into the kitchen and grabbed a beer. He followed me into the kitchen, came up behind me, and grabbed a beer out of the refrigerator, and he said, "where is it? Where's the money?", and we started getting into it a little bit more. I knew what he was talking about.
>
> Q: You did know what he was talking about?
>
> A: Yes, sir.
>
> Q: Okay.
>
> A: I said – it just escalated into an argument, started talking back to him. I said – started arguing back with him about the money, how all he could do was go out and party, and this and that, and I couldn't pay the bills, how I paid half the bills and the next thing I know people are coming to the door because they didn't get their money. He would go out and spend it, and I was yelling at him, and he was yelling at me, and I turned to walk back into the living room. About the time I got to the doorway, he pushed me and I turned around and it just became a struggle. It probably didn't last too long. We struggled around through the living room. We got over by the T.V. set. We were still pretty much just wrestling. It wasn't really a fight, it just – it just became more and more of a struggle. He was behind me, more or less hugging me from behind, and I pretty much fell across the coffee table. The gun had been laying on the coffee table. I had been working on it.
>
> Q: Was it loaded?

A: Yes, sir, it was.

Q: Was it out – I mean, it wasn't in the case or anything, is that correct?

A: No, sir. I had just put it back together. Seemed like we both started grabbing for it, just really – we just – it was in a flash. I don't know how long we really struggled for the gun or anything like that, but I pushed him off behind me, and I had the gun, and I turned around and he was pushing up off the couch, pretty much from a seated position, and he – and he was coming at me kind of head down and I fired the weapon. I couldn't even believe it, it's almost like I didn't even really know it – just fired the weapon, and he sat back down on the couch and just fell over backwards, just laid down, down on the couch. I stood there probably a couple of seconds. I – I got up to him and he was really and he was really bleeding. He was bleeding really bad, and I ran and got some towels, and I pulled him towards me and there was blood everywhere. He was alive, he was breathing. That's all I could really think about was stopping the blood at the time, and I tried to put towels by his head. I didn't know what to do and he stopped breathing and then I really panicked. I didn't know – I really didn't know what to do. I knew he was dead. I did everything I could really think of – I tried moving his head, everything. All I could think of was moving him somewhere, hiding him.

Q: So what did you do next?

A: Carried him into the kitchen. I set him on the floor and stood there and looked. He was dead. I rolled him up in the carpet and put him in the trunk of his car and took him where we found him tonight.

* * *

A: Yes, sir. It was some money that he was expecting in the mail and I knew about it 'cause he asked me to keep watching for it. . . . Probably two or three days after he quit asking about it, it came in the mail and I knew what it was and I cashed it.

Q: What kind of I.D. did you use to cash it, Dan?

A: Used his driver's – his driver's license.

Q: And whose picture is on the driver's license?

A: Mine is.

Q: Had you gone down to the driver's license bureau and told them you needed a duplicate license?

A: Yes, sir, I did.

Q: And did they ask you certain questions like where did you get this license and stuff like this, prior to them giving you a duplicate?

A: No, sir. They asked me for some kind of identification.

Q: What did you produce?

A: Produced a social security card, sir.

Q: Of John Russell?

A: Yes, sir.

Q: When did you take the social security card?

A: He gave that to me so I would have some kind of identification and that was about two days before I got the license.

Q: John gave you the social security card?

A: Yes, sir.

Q: Did he know that you were going to get a duplicate license in his - in his name?

A: Yes, sir. He did.

Q: Were you going to pay him any money to do that?

A: Yes, sir.

Q: Did you pay him any money?

A: I paid him more than my share of the utility bills.

Q: Okay. The – back to Wednesday, approximately what time did he get home?

A: Approximately 5:15 to 5:30.

Q: When did the scuffle, and the fight and gunshot – what time was that? How long – how long did it take, if you can tell me, five minutes, ten minutes?

A: From the time he got home till the time it was over, it was less than fifteen minutes.

* * *

Q: And where – where was the car that you loaded him into? Was it his car?

A: Yes, sir.

Q: In the trunk of his car?

A: Yes, sir.

Q: And what – what gate did you take him out of, the front gate to the back gate?

A: The back gate, sir.

Q: Wasn't it daylight?

A: Yes, sir.

Q: You didn't see anybody – any neighbors or anybody across the street?

A: No, I was just panicking, sir. I don't know.

* * *

Q: After you did this, what did you do? Was there anything in the house you had to clean up? Did you have to vacuum or anything? Did you have to straighten up? Did you break anything during the fight or scuffle?

A: There wasn't anything really broken, sir, just pushed some furniture back in place – just so excited. I wasn't really thinking, sir. I just pushed everything back pretty much straight. All I could

> think about doing was doing something with John. I mean after I took them to where we found him, I went back into the house and I didn't know what to do. I went to talk to Frances.
>
> * * *
>
> A: I explained to her about leaving Nebraska, told her all my feelings for her, things like that, sir.
>
> Q: Did you ever mention John?
>
> A: No, sir. I didn't.

(R. 2442-57).

At trial, the State argued that Mr. Peterka was claiming self-defense or accident due to his confession (R. 1165-9, 1180-3, 1298-9). The judge allowed the State to repeatedly introduce testimony about Mr. Russell's character and reputation for peacefulness (R. 1165-9, 1180-3, 1298-1300).

The medical examiner testified at trial that the cause of death was "a bullet wound to the brain" (R. 1201). He identified an entrance wound at the top of the skull (R. 1198). As to the exit wound, he originally believed that the bullet exited through the bridge of the victim's nose (R. 1225). However, during his pretrial deposition, defense counsel questioned him about Mr. Peterka's account of events and Dr. Kielman reconsidered his conclusions (R. 1232). Before trial, Dr. Kielman reconstructed the victim's skull and displayed the skull to the jury (R. 1232). Dr. Kielman determined that the bullet most likely traveled straight down in the victim's spinal area and that explained why no shell casing was ever recovered (R. 1232-4). Dr. Kielman

testified that the path of the bullet was consistent with Mr. Peterka's account of the how the victim was shot (R. 1256-7).

The jury found Mr. Peterka guilty of premeditated first degree murder (R. 1844).

The following day, a brief penalty phase was conducted. The State relied on the testimony presented at the guilt phase. Mr. Peterka presented the testimony of his mother, Ruben Purvis, Connie LeCompte and Cindy Rush (R. 1870-1903). Mr. Peterka also testified in his own behalf (R. 1905).

Mrs. Peterka told the jury that Dan, was the eldest of five children. Dan was a good athlete and older brother (R. 1890). When asked why the jury should recommend life, Mrs. Peterka made an emotional plea to the jury:

> Because he is a human being, because he is my son, because he is good, because God created him, because I love him, because his whole family loves him, because he's a friend, because he helps people. It's such a difficult question. It's everything I believe in. He is a child of God. He needs your help. You have my son's life in you hands. I'm not trying to justify anything. I'm trying to beg you to help him and not to destroy him. He has life. He has good to give; he has good to share; and I love him with all of my heart. My words come from my heart.

(R. 1896). Finally, Mrs. Peterka offered the jury a photo album that contained photographs of the Peterka family and Dan when he was younger (R. 1892).

On cross examination, the State asked Mrs. Peterka: "When he was a child he got into quite a bit of trouble with the law?" (R. 1897). The defense objected, but the trial court overruled the

objection. The State proceeded to question Mrs. Peterka about Dan's non-violent juvenile record (R. 1897-9, 1901-2).

Rush described Mr. Peterka and told the jury that he was a "caring and understanding" person (R. 1882).

Purvis testified that Mr. Peterka was a responsible, excellent employee (R. 1871).

LeCompte testified that Mr. Peterka was wonderful with her children and helped her and her husband a great deal while he lived with them (R. 1876). In fact, Mr. Peterka took care of her children when she was admitted in the hospital for emergency surgery (R. 1877).

Mr. Peterka told the jury: "I feel I have something, something that I can share with society and I would like to keep my life" (R. 1905). He also stated: "I would like to say to John's family and friends, if I thought I could bring him back, John, I would be glad to give you my life (R. 1905).

The jury recommended that Mr. Peterka be sentenced to death by an eight to four vote (R. 1930).

A sentencing hearing was held on April 25, 1990. At the hearing, defense counsel requested that the court consider the numerous letters from Mr. Peterka's family and friends in determining whether Mr. Peterka should be sentenced to death (R. 2056-75). The court sentenced Mr. Peterka to death (R. 2077-8). The court's sentencing order which was read in open court stated, in its entirety:

> The Court finds the following aggravating circumstances to have been proven beyond a reasonable doubt:
>
> (1) The crime for which DANIEL JON PETERKA is to be sentenced was committed while he was under sentence of imprisonment;
>
> (2) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
>
> (3) The crime for which the defendant is to be sentenced was committed for pecuniary gain;
>
> (4) The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
>
> (5) The crime for which the defendant is to sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The Court also found the following mitigating circumstances to exist:
>
> (1) The defendant has no significant history of prior criminal activity.
>
> While there was evidence tending to show other mitigating circumstances, the Court did not find any to exist.
>
> The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(R. 2077-8).[1]

During Mr. Peterka's direct appeal, this Court identified numerous errors that occurred at the penalty phase of Mr. Peterka's capital trial. This Court found that it was error for the State to introduce testimony about Mr. Peterka's prior

[1]All of the aggravators found by the court were considered by the jury. Also, the aggravators were read to the jury without any limiting instructions.

juvenile convictions, because defense counsel did not open the door to offer this evidence. *Peterka v. State*, 640 So. 2d 59, 70 (Fla. 1994).

This Court also found that the trial court had improperly doubled the aggravating circumstances of avoiding a lawful arrest and hindering the lawful exercise of a governmental function or enforcement of the laws. *Id*. at 71. The Court also found that "the trial court improperly considered the pecuniary gain aggravating circumstance." *Id*.

This Court found the errors that occurred at the penalty phase to be harmless. *Id*. at 71-2.

Following his direct appeal, Mr. Peterka filed a series of Rule 3.850 motions. (PC-R. 1-148, 290-336, Supp. PC-R. 168-9).

The circuit court ordered that an evidentiary hearing be held, but limited the claims to allegations of ineffective assistance of trial counsel (PC-R. 465-6).

On June 28-29 and July 16, 2001, an evidentiary hearing was held. At the hearing, four of Mr. Peterka's family members testified: his mother, Linda Peterka; his father, Jon Peterka; his sister, Karyn Hilliard; and his brother, Timothy Peterka. In addition, Mr. Peterka also presented the testimony of a forensic pathologist, Dr. Joseph Cohen, his trial attorney's, Mark Harllee and Earl Loveless, and trial investigator, Bill Graham, Lieutenant Alan Atkins from the Okaloosa County Jail and Martha

Shurgot a records custodian from the Okaloosa County Jail and himself.

As to his ineffective assistance of counsel at the penalty phase claim, Mr. Peterka presented the testimony of his family members to describe his background: Mr. Peterka was the first of five children of Jon and Linda Peterka (T. 9).

Mrs. Peterka described Dan's responsibilities in the family: He was expected to do chores and care for his younger siblings (T. 21).

The circuit court judge interrupted Mrs. Peterka's testimony and told postconviction counsel:

> Well, I'm looking at her previous testimony, and she was asked to describe to the jury why she thinks that her son should stay alive, and it would appear to the Court that this entire line of questioning was – or answer was available to her under that question. She talks about her relationship with her son and her husband. If you're going to take five minutes, that's fine. You know and I know that we could go for three days on this one question.

(T. 22). The circuit court was uninterested in Mrs. Peterka's testimony and told counsel: "[I]f you have prepared something that's going to get the Court's attention, it's time for me to hear it." (T. 24). Postconviction counsel abruptly stopped that line of questioning of Mrs. Peterka (T. 25).

Prior to the interruption, Mrs. Peterka did inform the court that Dan served in the National Guard and received commendations during his service (T. 17; Def. Exhibits 1, 2 & 3). Mr. Peterka's

discharge status was a general discharge with honorable conditions (T. 19). One of the commendations read:

> You are to be commended for your outstanding demonstration of leadership. You have displayed an exceptional ability and put forth the extra effort to be the best. The Army requires strong, dedicated leaders to insure our fighting forces maintain the confidence and willingness to follow. You have demonstrated this ability to lead in your desire to be the best.

(T. 20, Def. Ex. 4).

Mr. Peterka's mother attempted to testify about Dan's completion of his GED, but the circuit court sustained the State's objection that the State was give no notice of the specific allegation that Mr. Peterka obtained his GED (T. 40).

Mrs. Peterka also explained that Dan was her daughter and his sister, Annie's godfather (T. 25). Mrs. Peterka never knew Dan to be violent (T. 27).

Jon Peterka told the court that his son, Dan, enjoyed fixing cars and was mechanically inclined (T. 78). He testified that Dan was very helpful to his family and friends (T. 79-80).

Mrs. Peterka explained that she primarily spoke to Investigator Graham in the months preceding her son's trial and had very little contact with trial counsel, Earl Loveless (T. 11, 12). Mrs. Peterka did not even recall Mark Harllee's name (T. 29). Mr. Peterka's father, Jon, thought Harllee's name sounded familiar but recalled having contact with Graham and Loveless (T. 75).

Mrs. Peterka and her husband met with Loveless once, for about fifteen minutes after the jury convicted Mr. Peterka (T. 13). Mrs. Peterka and her husband traveled to Florida after the guilt phase of the trial had already begun and met with Loveless at his office for a short period of time. Mrs. Peterka told the lower court: "We were not advised as to whether we could do something to help [Dan] or not because more or less everything would be just okay" (T. 13). Mrs. Peterka testified that: "[A]fter Daniel was convicted [] I was invited into the courtroom to participate, and my participation was to be able to ask the jury for leniency or to be able to beg for my son's life which is what I attempted to do . . ." (T. 14). Mrs. Peterka was not told about what information could be mitigating (T. 15-6). Mr. and Mrs. Peterka were not informed that other witnesses could testify or that exhibits could be introduced (T. 16).

In fact, Mrs. Peterka never considered the possibility of Mr. Peterka's siblings attending the trial or testifying because noone mentioned it to her (T. 36).

Likewise, Jon Peterka recalled that noone ever informed the family of any preparation that was being done or needed to be done for the penalty phase (T. 77, 90-1). Jon Peterka also recalled that when he and his wife arrived in Florida they went to Loveless' office and introduced themselves (T. 78). The meeting with Loveless lasted for about ten minutes (T. 78).

Prior to traveling to Florida, Graham requested that Mrs. Peterka assemble a photo album to show that "Dan was a person, Dan was an intricate part of a family" (T. 38).

Mr. Peterka's parents paid for their own travel to Florida and once they arrived, they were told that they could be reimbursed for their travel costs (T. 33).

At the evidentiary hearing, Karyn Hilliard, Peterka's sister testified. At the time of the trial, Hilliard was eighteen years old (T. 97). Hilliard would have testified on her brother's behalf had she been requested to do so (T. 97). Hilliard described Dan as a "very typical American big brother." (T. 98). He always protected his younger siblings (T. 98).

Mr. Peterka's brother, Timothy Peterka, also testified at the evidentiary hearing. At the time of the evidentiary hearing, Tim Peterka was a sergeant in the United States Marines (T. 111). Postconviction counsel attempted to elicit testimony from Tim Peterka about the commendation that Dan Peterka had earned while he was enlisted in the National Guard (T. 111-2). The lower court prohibited Tim Peterka from testifying in this regard (T. 112-3).

Tim Peterka did testify about the fact that Dan was a good older brother (T. 113), and always looked out for him (T. 114).

Daniel Peterka also testified in his own behalf. Mr. Peterka recalled that after the jury convicted him, Harllee spoke with him briefly about the penalty phase (T. 191). The conversation with Harllee lasted under twenty minutes and Harllee did not ask

Mr. Peterka about his military history or his conduct during his pretrial incarceration (T. 192-3).

Mr. Peterka recalled being told what happened during the penalty phase proceeding, but he was never told or asked about any information that he had that would be helpful (T. 194). In fact, Mr. Peterka never discussed his testimony with his attorneys (T. 194).

Mr. Peterka testified that while he was incarcerated he was classified in general population which was very rare for an individual charged with capital murder (T. 193). He also told the court that he had no disciplinary reports (T. 193). While Mr. Peterka was incarcerated, his cellmates successfully escaped from the jail (T. 195). Mr. Peterka did not participate in the escape and he remained in his cell all night (T. 195). Mr. Peterka did not want to be a fugitive, again (T. 206).

Mr. Peterka also testified about his service in the Minnesota National Guard. During Mr. Peterka's basic training he was the platoon leader of approximately sixty individuals (T. 197). After basic training, Mr. Peterka became the class leader in advanced individual training (T. 197). Mr. Peterka achieved these positions based on "the way you conducted yourself, the way you performed, test scores" (T. 198).

Mr. Peterka discussed his service with Graham when they discussed Mr. Peterka's presentence investigation report (T. 203).

Mr. Peterka also testified that he was aware of the plea offer at the time of trial which would have required him to serve life with a minimum mandatory twenty-five years (T. 210-1). But he did not accept the plea offer because "the shooting did not occur as [the prosecutor] claimed at trial" (T. 211).

Alan Atkins, an officer at the Okaloosa County Jail, testified that he remembered Mr. Peterka from his pretrial incarceration in 1989-90 (T. 491-2). Officer Atkins did not recall Mr. Peterka having any disciplinary problems at the jail (T. 492), and characterized Mr. Peterka as a "little better" than the normal inmate (T. 494).

SUMMARY OF ARGUMENT

1. Because four jurors at Mr. Peterka's 1990 penalty phase voted in favor of a life recommendation, his death sentence stands in violation of the Eighth Amendment because society's evolving standards of decency no longer allow death sentences to impose when one or more jurors vote to recommend life sentences.

2. Mr. Peterka's death sentence violates the Florida Constitution because the jury did not unanimously find the elements necessary to authorize the imposition of a death sentence, and the failure to apply the ruling in *Hurst v. State* retroactively in Mr. Peterka's case violates the Eighth Amendment because of the acknowledged unacceptable risk that the decision to impose the death sentences was unreliable.

3. The partial retroactivity that resulted from the decisions in *Asay v. State* and *Mosley v. State* created lines that arbitrarily separated those who received the retroactive benefit of *Hurst v. State* and *Hurst v. Florida* from those who did not on the basis of totally irrelevant factors such as luck and good fortune thus depriving death sentences such as Mr. Peterka's of the level of reliability that the Eighth Amendment demands.

4. In light of the new Florida law, and in recognition that requiring juror unanimity before making an individual eligible for a death sentence, this Court should remand for the circuit court to reevaluate Mr. Peterka's *Strickland* claim.

5. Mr. Peterka's death sentence violates the sixth amendment under *Hurst v. Florida*.

ARGUMENT

ARGUMENT I

GIVEN THAT FOUR JURORS VOTED IN FAVOR OF A LIFE SENTENCE, MR. PETERKA'S DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT AND MUST BE VACATED.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' Weems v. United States, 217 U.S. 349, 378 (1910)." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

Under the United States Supreme Court's Eighth Amendment jurisprudence, whether a particular sentence is "cruel and unusual" depends on the current and prevailing societal norms. The United States Supreme Court has looked to the laws enacted by state legislatures as providing the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Of course, "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175-176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted).

In *Hurst v. State*, 202 So. 3d 40, 61 (Fla. 2016), this Court concluded that the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed." Quoting the United States Supreme Court, *Hurst v. State* noted, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id*. From a review of the capital sentencing laws throughout the United States, this Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. This Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63. As this Court explained in *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death.

This Court in *Hurst v. State* noted that when it issued on October 14, 2016, Florida was "one of only three [states] that [did] not require a unanimous jury recommendation for death." *Hurst v. State*, 202 So. 3d at 61. In a footnote, this Court noted that as to one of the three states, Delaware, a recent ruling by the Delaware Supreme Court had declared its state statute unconstitutional for failing to require a jury to unanimously find the applicable aggravating circumstances. Since the decision in *Hurst v. State*, Chapter 2017-1 was enacted on March 13, 2017. Pursuant to it, § 921.141 was revised and now requires a jury to return a unanimous death recommendation before a judge is authorized to impose a death sentence.

The third state that did not require a unanimous jury recommendation for death was Alabama. However, legislation was enacted on April 11, 2017, in Alabama to eliminate a judicial override and require the imposition of a life sentence when three

or more jurors voted to favor of recommending a life sentence. Thus, Alabama now remains the only state to not require a jury to unanimously recommend a death sentence before a death sentence is authorized. But with this the recent change in Alabama law, no state permits a death sentence to be imposed when three or more jurors vote in favor of a life recommendation.

In Mr. Peterka's case, four jurors voted to recommend life sentences. No state in the country permits the imposition of a death sentence in such circumstances. The imposition of a death sentence when four jurors have formally voted in favor of life sentences clearly violates the societal evolving standards of decency.

In any event, with the enactment of Chapter 2017-1 on March 13, 2017, Florida is no longer an outlier along side Alabama. Florida, like the rest of the nation, now requires the jury to return a unanimous death recommendation before a judge is authorized to impose a death sentence. The national consensus this Court recognized in *Hurst v. State*, now includes Florida. In fact, there is now a statute recognizing a consensus within Florida that when even a single juror votes in favor of a life recommendation, a death sentence cannot be imposed. Mr. Peterka's death sentence stands in violation of both the national consensus and the consensus within the State of Florida. Mr. Peterka's death sentence violates the evolving standards of decency and constitutes cruel and unusual punishment.

As societal's norms evolve, a sentence that was in compliance with the Eighth Amendment when imposed, may constitute cruel and unusual punishment before the sentence has been completed or carried out. "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016).

Mr. Peterka's death sentence was imposed despite four jurors voting in favor of life recommendations. Under Chapter 2016-13 which was enacted on March 7, 2016, Florida law no longer permitted the imposition of a death sentence in such circumstances. Then in light of *Hurst v. State* and with the enactment of Chapter 2017-1, Florida law no longer permits death sentences to be imposed if a single juror voted to recommend a life sentence. Florida societal norms have evolved. To carry out an execution of individual whose death sentences were imposed in a manner no longer viewed as acceptable and no longer seen as sufficiently reliable to justify the imposition of the ultimate punishment, violates society's evolving standards of decency. As a result, the death sentence imposed on Mr. Peterka violate the Eighth Amendment because they constitute cruel and unusual punishment.

Mr. Peterka's death sentence which was imposed despite four jurors voting for a life recommendation can no longer stand. At a minimum, a resentencing must be ordered.

ARGUMENT II

MR. PETERKA'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION UNDER *HURST V. STATE* AND, THEREFORE, SHOULD BE VACATED.

Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Id.* at 714. The Florida Legislature adopted the English common law rule on November 6, 1829 with enactment of Section 775.01 of the Florida Statutes. *See id.* Florida's first Constitutional Convention adopted the right to a jury trial when it proclaimed in Article I of our Declaration of Rights that "the right of trial by jury, shall for ever remain inviolate." Fla. Const. art. I, § 6.

This Court recognized over a century- and-a-half ago that "[t]he common law wisely requires the verdict of a petit jury to be unanimous." *Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859). It has held true to that requirement over the years, starting in *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881), that

"[t]he record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact," and later in *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) that "[i]n this state, the verdict of the jury must be unanimous."

The criminal defendant's right to a jury's unanimous verdict reflecting juror unanimity as to the establishment of each element of the criminal offense beyond a reasonable doubt is a substantive right under the Florida Constitution.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court held that in light of *Hurst v. Florida* in order for a death sentence to be authorized under Florida law, the statutorily required and identified facts were in effect elements of the criminal offense, i.e. capital first degree murder. A death sentence was not authorized until a jury returned a verdict finding the defendant guilty and each element of the offense proven by the State beyond a reasonable doubt. Based upon a Florida defendant's substantive right to be convicted of a criminal offense only upon a unanimous jury verdict, this Court held in *Hurst v. State* that the jury must return a unanimous verdict reflecting a unanimous finding of the necessary facts and a unanimous death recommendation before a death sentence was authorized. This unanimity requirement was not derived from *Hurst v. Florida* itself nor the Sixth Amendment, but from the Florida Constitution, and alternatively from the Eighth Amendment.

As this Court explained in *Hurst v. State* the unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. Thus, *Hurst v. State* was broader in scope than *Hurst v. Florida* because the substantive right under the Florida Constitution was found to apply. This was because *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder. The substantive right that a conviction can only be returned by a unanimous jury verdict is contained in the Florida Constitution:

> We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution**. This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d at 57 (emphasis added) (footnote omitted).

Hurst v. State issued on October 14, 2016. It delineates for the first time a Florida capital defendant's substantive right to

a unanimous jury making the statutorily required finding of facts necessary to authorize his death sentence. *See King v. State*, 211 So. 3d 866, 889 (Fla. 2017)(In *Hurst v. State*, "[w]e further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death.").

In *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017), this Court applied the fundamental constitutional right to a unanimous jury verdict recommending a death sentence retroactively. A resentencing was ordered in *McGirth* "[b]ecause the jury vote was eleven to one". *Id.* at 1164. The failure to return a unanimous death recommendation could not be found to be harmless beyond a reasonable doubt

In *King v. State*, 211 So. 3d at 889, this Court held:

> in *Mosley v. State*, Nos. SC14-436 & SC14-2108, --- So.3d ----, 2016 WL 7406506 (Fla. Dec. 22, 2016), we further held that our decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Thus, this Court recognized that *Hurst v. State* "has been held to apply retroactively." However, the *Witt* analysis set forth in *Mosley* only analyzed retroactivity in post-*Ring* cases.

In *Hurst v. State*, this Court had explained at length the considerable benefit to the administration of justice that the substantive right to a unanimous death recommendation would provide because it would result in more reliable death sentences:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:
>
> > The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which **gives particular significance and conclusiveness to the jury's verdict**.
>
> *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "**[b]oth the defendant and society can place special confidence in a unanimous verdict**." *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "**the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' "** *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58-59 (emphasis added). Thus, the ruling that the Florida Constitution required juror unanimity when returning a death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59 (explaining juror unanimity "will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty").[2]

[2]In *Hurst v. State*, this Court observed that studies comparing majority rule juries to those required to return a unanimous verdict showed enhanced reliability in unanimous verdicts. 202 So. 2d at 58 ("it has been found based on data that

The enhanced reliability afforded by the fundamental right to a unanimous death recommendation must be applied retroactively under the Eighth Amendment and its requirement that death sentences have a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988). Thus, the Eighth Amendment requires *Hurst v. State* to be applied in Mr. Peterka's case. Under *Hurst v. State*, Mr. Peteka's death sentence cannot stand, At a minimum, a resentencing is required.

ARGUMENT III

THE RETROACTIVITY RULINGS IN *ASAY v. STATE* AND *MOSLEY v. STATE* THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CATEGORY BY CATEGORY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCING SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*.

In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the United States Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and

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'behavior in juries asked to reach a unanimous verdict **is more thorough** and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness.'") (emphasis added); *Id.* ("juries not required to reach unanimity **tend to take less time deliberating and cease deliberating** when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule **express less confidence in the justness of their decisions.**") (emphasis added).

capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability").

In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the United States Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law

contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

The heightened need for reliability in capital proceedings process was recognized by this Court when in 1999 it adopted minimum standards for attorneys in capital cases. *See* Fla. R. Crim. P. 3.112.[3] In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), this Court noted the Eighth Amendment need to insure a fair capital process that operated in a reliable manner:

> We acknowledge we have a constitutional responsibility to ensure **the death penalty is administered in a fair, consistent and reliable manner**, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.

(emphasis added). In *Allen v. Butterworth*, 756 So. 2d 52, 67 (Fla. 2000), this Court explained that competent representation by collateral counsel was critical and necessary in order to insure reliability in capital cases:

> **A reliable system of justice** depends on adequate funding at all levels. * * * It is critical that this state provides for adequately funded and trained public defenders, conflict counsel, and CCR and registry counsel, **as these are vital to the reliability** and

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[3]When issuing Rule 3.112, this Court explained that the minimum standards were: "an important step in ensuring the integrity of the judicial process in capital cases by adopting a rule of criminal procedure to help **ensure that competent representation will be provided to indigent capital defendants in all cases**." *In re Amendment to Fla. Rules of Crim. Pro.*, 759 So. 2d 610, 611 (Fla. 1999) (emphasis added). It further noted: "This Court has a continuing obligation to ensure the integrity of the judicial process in all cases. **Our overview is especially important in death penalty cases**." *Id.* at 612.

> efficiency of the trial, appellate, and postconviction process.

(emphasis added) (footnotes omitted). In *Fla. Dep't of Financial Services v. Freeman*, 921 So. 2d 598 (Fla. 2006), Justice Pariente wrote in a specially concurring opinion: "**the credibility of our death penalty** system depends in large part on **the quality of the attorneys** who undertake the representation." 921 So. 2d at 604 (emphasis added). Justices Anstead and Cantero concurred.

When *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), issued, this Court failed to honor the binary nature of retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The binary nature of *Witt* was not followed, and no explanation was offered in either *Asay* or *Mosley*. However, the dissenting opinions in both cases revealed five of this Court's seven justices did not agree the resulting partial retroactivity. *See Mosley v. State*, 209 So. 3d at 1291 (Canady, J., dissenting, joined by Polston, J.) ("Based on an indefensible misreading of Hurst v. Florida and **a retroactivity analysis that leaves the *Witt* framework in tatters**, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years.") (emphasis added); *See Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See*

Perry, J., dissenting op. at 58. However, that is where the majority opinion **draws its determinative, albeit arbitrary, line.** As a result, Florida will treat similarly situated defendants differently— here, the difference between life and death—for potentially the simple reason of one defendant's docket delay.") (emphasis added); *Id.* at 36 (Pariente, J., concurring in part, dissenting in part) ("The majority's conclusion results in an unintended **arbitrariness** as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.") (emphasis added); *Id.* at 37 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is **arbitrary and cannot withstand scrutiny under the Eighth Amendment** because it creates an arbitrary application of law to two groups of similarly situated persons.") (emphasis added).

The repudiation of a binary approach to retroactivity set forth in *Witt* was also a repudiation of the *Stoval/Linkletter* standard that was adopted in *Witt*. It left the retroactivity standard without an objective principled basis, but instead rests upon some variable subjective standard of two justices.[4]

The decisions in *Asay* and *Mosley* opened the door and invited arbitrariness inside to infect Florida's death penalty system and

[4]An analysis of the *Asay* and *Mosley* opinions, reveals only two justices of this Court supported partial retroactivity.

render in violation of the Eighth Amendment.[5] *See Desist v. United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) ("[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."). When Florida ignored the inherent imprecision in testing for intellectual disability, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Hall v. Florida*, 134 S. Ct. at 2001. In abandoning the binary approach to retroactivity, the court has embraced similar imprecision as created mechanical rules that arbitrarily draw lines based on dates and times have nothing to do with reliability and/or fairness. As five justices of this Court recognized, the new approach to retroactivity insures an unreliable and arbitrary death penalty system, i.e. a walking violation of the Eighth Amendment. *See Johnson v. Mississippi*, 486 U.S. at 584-85

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[5]In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), this Court noted the Eighth Amendment required extra weight to be given to "individual fairness because of the possible imposition of a penalty as unredeeming as death." In a footnote, the Florida Supreme Court wrote: "It bears mention that **the constitutionality of Florida's capital sentencing procedures**, s 921.141, Florida Statutes (1979), **is contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty**." *Id.* at 926 n.7 (emphasis added).

("Although we have acknowledged that 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death,"' we have also made it clear that such decisions cannot be predicated on mere 'caprice' **or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process**.'") (emphasis added).

As a result, Mr. Peterka's death sentence is infected by the arbitrary and standardless manner in which this Court backed into partial retroactivity. The Eighth Amendment requires all capital defendants to be treated the same and receive full retroactivity of *Hurst v. State* and *Hurst v. Florida*.

ARGUMENT IV

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE, ALL OF WHICH ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND REQUIRE THE JURY TO UNANIMOUSLY FIND THE STATUTORILY REQUIRED FACTS NECESSARY TO AUTHORIZE A DEATH SENTENCE AND ALSO REQUIRE THE JURY TO UNANIMOUSLY RECOMMEND A DEATH SENTENCE BEFORE THE JUDGE WOULD BE AUTHORIZED TO IMPOSE A DEATH SENTENCE, MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. PETERKA'S PREVIOUSLY PRESENTED *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. PETERKA'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING.

In *Perry v. State*, this Court held that to be constitutional the findings of fact and the death recommendation necessary to authorize the imposition of a death sentence had to be reached unanimously by the jury. *Perry* held:

> to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

210 So. 3d 630, 640 (Fla. 2016). In deciding whether to recommend a death sentence, jurors may choose to vote in favor of a life sentence to be merciful. *Id.* ("This final jury recommendation, apart from the findings that sufficient aggravating factors exist

and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the 'mercy' recommendation."). This is the law that now governs when a death sentence is vacated and a resentencing is ordered in a capital case. In *Hurst v. State*, this Court explained:

> Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

Hurst v. State, 202 So. 3d at 62.

In *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014), this Court explained that when presented with qualifying newly discovered evidence:

> the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

In *Swafford*, this Court indicated the evidence to be considered in evaluating whether a different outcome was probable included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). The "standard focuses on the likely result that would occur during a new trial with all

admissible evidence at the new trial being relevant to that analysis." *Id*. Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, the new law would apply at a resentencing and would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

This is new Florida law that did not exist when Mr. Peterka previously presented his *Strickland* claims. Accordingly, before *Perry v. State* and *Hurst v. State* on October 14, 2016, Mr. Peterka could not present his claim as set forth herein because the new law that would govern any resentencing ordered in Mr. Peterka's case was previously unavailable. Mr. Peterka's previously presented claims must be re-evaluated in light of the new Florida law.

This Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So. 3d 40, 59 (Fla. 2016). *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005),

quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). This Court in *Hurst v. State* also held:

> 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.

202 So. 3d at 60. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death

recommendation before a death sentence is even a sentencing option. Certainly the previous rejection of a *Strickland* claim on the basis of a defendant's failure to show that trial counsel was not deficient in presenting the mitigation and that the mitigation did not cause prejudice because the evidence would not have likely led to six jurors to vote for a life sentence no longer comports with the law since Florida law now provides that if one juror votes for a life sentence, a life sentence must be imposed. The *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

At Mr. Peterka's penalty phase proceeding, four jurors voted in favor a life sentence. This was after the jury had been instructed that the sentencing recommendation was to be based on "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." The additional mitigation presented in Mr. Peterka's previous Rule 3.851 motion must be

evaluated under the standard set forth in *Swafford* and *Hildwin* and that means that all of the evidence that would be admissible at a resentencing which includes the mitigating evidence presented to meet the prejudice prong of the *Strickland* standard governing ineffectiveness claims. With all the new evidence that would be admissible at a resentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. A single juror voting for a life sentence under *Hurst v. State* and *Perry v. State* would mean that a life sentence would be the only sentencing option. Thus, when the proper *Swafford/Hildwin* analysis is conducted with proper consideration given to the new Florida law arising from *Hurst v. State* and *Perry v. State*, it is in fact more likely than not that, armed with much more mitigating evidence, correcting the numerous errors that occurred at Mr. Peterka's penalty phase, and with *Caldwell* compliant instructions regarding each juror's sentencing responsibility, Mr. Peterka would be able to persuade at least one juror to vote for a life sentence. That means one juror's vote in favor of a life sentence is much more likely to undermine confidence in the reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* claim.

Because the new Florida law will apply at a retrial or resentencing, it constitutes new law within the meaning of Rule

3.851 because it extends a new right to capital defendants, i.e. the right to a life sentence if one juror votes in favor of a life sentence. This new law and the new right it extends requires this Court to revisit Mr. Peterka's previously presented *Strickland* claim with the requisite analysis set forth in *Hildwin* and *Swafford*. Here, with four jurors at the original penalty phase voting in favor of a life sentence, Mr. Peterka clearly can demonstrate that confidence in the reliability of the outcome is undermined.

ARGUMENT V

MR. PETERKA'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST v. FLORIDA*.

The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held, "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances

existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. 616, 620-21 (2016). *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

Hurst v. Florida was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect to all capital postconviction defendants.

Specifically, in *Mosley v. State*, this Court determined that *Hurst v. Florida*, 136 S. Ct. 616 (2016), constituted a change in Florida law that was to be applied retroactively to Mosley and

required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing.[6] As this Court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." 210 So. 3d 1248, 1281 (Fla. 2016).

In *Mosley*, this Court held that under Florida law, there are two separate and distinct approaches for conducting retroactivity analysis. 210 So. 3d at 1276. The first approach to retroactivity discussed in *Mosley* was explained as follows:

> This Court has previously held that **fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence**. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), should apply retroactively. *James*, 615 So.2d at 669. Although pre-*Espinosa* this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in *Espinosa* that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of *Espinosa*. *James*, 615 So.2d at 669. While this Court did not employ a standard retroactivity analysis in James, the basis for granting relief was that of fundamental fairness. *Id*.

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[6]The homicide at issue in *Mosley* occurred in 2004. Thereafter, Mosley was tried, convicted and sentenced to death. The judgment and sentence were affirmed on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009), *cert denied* 562 U.S. 887 (2010).

> This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id*.

Mosley, 210 So. 3d at 1274 (emphasis added). Clearly, *James* is cited as an example of the fundamental fairness approach to determining when a particular defendant is entitled to the retroactive application of a change in law mandated by a decision from the United States Supreme Court. It is also clear that the fundamental fairness approach requires a case-by-case determination of which collateral litigants get the benefit of the change in law retroactively.

The second approach to retroactivity discussed in *Mosley* is the analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Employing *Witt*, this Court concluded: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time." 210 So. 3d at 1280.[7] Further, the Court in *Mosley* explained that:

> holding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief. As we determined in *Hurst*, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will

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[7]The use of the word "fairness" in the context of the *Witt* analysis would suggest that fairness, indeed fundamental fairness, is this Court's central concern in determining which defendants should retroactively receive the benefit of *Hurst v. Florida*.

> receive a new penalty phase. *Hurst*, 202 So.3d at 67–68; *James*, 615 So.2d at 669. Additionally, we have declined to find *Hurst* applicable to those cases where the defendant waived his/her right to trial by jury. *See Mullens v. State*, 197 So.3d 16 (Fla.), *pet. for cert. filed*, No. 16-6773 (Nov. 4, 2016).
>
> Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

210 So. 3d at 1282-3. In Mr. Peterka's case, the difference is between one life sentence and death. It is only Mr. Peterka's sentence that will be impacted by the retroactive application of *Hurst v. Florida*.

This Court concluded that under either the fundamental fairness approach to retroactivity or under the *Witt* analysis, *Hurst v. Florida* was a change in law that was to be retroactively applied in *Mosley*:

> Applying *Hurst* retroactively to Mosley, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in *Witt*:
>
> > [S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

> 387 So.2d at 925 (citations omitted) (emphasis added).

210 So. 3d at 1283.

In Mr. Peterka's case, fundamental fairness demands that *Hurst v. Florida* be applied retroactively due to several facts: 1) during his direct appeal, this Court found that it was error for the State to introduce testimony about Mr. Peterka's prior juvenile convictions; 2) this Court also found that the trial court had improperly doubled the aggravating circumstances of avoiding a lawful arrest and hindering the lawful exercise of a governmental function or enforcement of the laws; 3) this Court also found that "the trial court improperly considered the pecuniary gain aggravating circumstance, because defense counsel did not open the door to offer this evidence. *Peterka v. State*, 640 So. 2d 59, 70-1 (Fla. 1994); 4) Mr. Peterka challenged his sentence of death because of the constitutional flaws in Florida's sentencing statute in his initial petition for writ of habeas corpus. Thus, the jury recommending that Mr. Peterka be sentenced to death, by the narrow eight to four margin, was woefully misinstructed and considered irrelevant and inapplicable aggravating factors.

Further, fundamental fairness requires the retroactive application to Peterka because the enactment of Chapter 2017-1 and the decision in *Perry v. State* demonstrate that capital defendants charged with murders that were committed long before

Hurst v. Florida issued or Chapter 2017-1 was enacted will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or resentencing occurring in the future, as well as those that have already occurred if a resulting death sentence was not final when *Hurst v. Florida* issued on January 12, 2016. For example, this Court recently ordered a resentencing in Lancelot Armstrong's case. *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017). The homicide at issue there occurred in early 1990. Armstrong's conviction and death sentence were affirmed on direct appeal. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert denied* 514 U.S. 1085 (1995). In collateral proceedings, a resentencing was ordered. *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). However, the first degree murder conviction that became final in April of 1995 has remained final. *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in Armstrong's case.

This Court recently granted a resentencing in Paul Johnson's case. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). He had been convicted of three 1981 homicides. The convictions were final in 1993. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992), *cert denied*, 508 U.S. 919 (1993). His death sentences were vacated in collateral proceedings in 2010. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). After again receiving death sentences, this Court in his recent appeal ordered another resentencing. However, the

first degree murder convictions that became final in 1993 have remained final. *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in Johnson's case.

The Eleventh Circuit recently granted a resentencing in John Hardwick's case. *Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015). Hardwick was convicted of a 1984 homicide. His conviction became final in 1988. *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). That conviction is still intact. *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in Hardwick's case.

This Court recently ordered a resentencing in James Card's case. Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). His death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, postconviction relief issued and a resentencing was conducted in 1999. An 11-1 death recommendation led to another death sentence that was affirmed, and then became final 4 days after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). However, the first degree murder conviction that became final in 1984 has remained final. *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in Card's case.

A circuit court has recently granted J.B. Parker a resentencing on the basis of *Hurst v. State*. Though the State may appeal, under the governing law this Court is likely to affirm the grant of a resentencing. Parker was convicted of a 1982 homicide and sentenced to death. The conviction and death sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In 1998, Parker's death sentence was vacated though the conviction remained intact and final. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998). Parker received another death sentence after the jury returned an 11-1 death recommendation. This Court affirmed on appeal. *Parker v. State*, 873 So. 2d 270 (Fla. 2004). Now because the death sentence became final after *Ring v. Arizona* issued, the circuit court has ordered another resentencing. However, the first degree murder conviction that became final in 1985 has remained final. *Hurst v. Florida* and the new Florida law will govern the sentencing procedure in Parker's case.

With Armstrong, Johnson, Hardwick, Card and Parker all entitled to the benefit of *Hurst v. Florida* and the resulting new Florida law for murders committed as early as 1981, ensuring uniformity and fundamental fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law.

Moreover, in *Hurst v. State*, this Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to

be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. This Court specifically noted that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Id.* at 59. Thus, the new Florida law will enhance the reliability of the death sentences that juries unanimously authorize. Clearly, uniformity and fairness require that Mr. Peterka be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

The procedure employed when Mr. Peterka received a death sentence deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury's verdict authorizing a death sentence to be unanimous or else a life sentence is required. In the wake of *Hurst v. Florida*, this Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d at 58, 62, n. 18. Individual jurors may decide to exercise "mercy" and vote for a

life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016).

In *Hurst v. State*, this Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." 202 So. 3d at 68. In other words, the State must prove beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Mr. Peterka by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Mr. Peterka's death sentence and the likely outcome if a resentencing were conducted in conformity with Florida's new capital sentencing procedure.

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Peterka's case.

Mr. Peterka's penalty phase jury did not return a verdict making any findings of fact. The only document returned by the jury was an advisory recommendation that a death sentence be imposed. And, this advisory verdict was not unanimous. Four jurors did not join in the death recommendation. One juror voting for a life sentence is all it takes, as explained in *Hurst v. State*, for a binding life recommendation mandating the imposition of a life sentence. The fact that four jurors here recommended life in and of itself shows that there must be doubt that a properly instructed jury would have unanimously returned a death recommendation.

Moreover, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*. Mr. Peterka's jury was told the exact opposite–that Mr. Peterka could be sentenced to death regardless of the jury's recommendation. As was explained in *Caldwell*, jurors must feel the weight of their

sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude the a death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell,* the Supreme Court held that the jury's **unanimous** verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulted death sentence to be vacated even though the jury's verdict there was unanimous. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). In Mr. Peterka's case, four jurors voted for a life sentence. In this circumstance, the chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("**In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences** when there are state-induced suggestions that the

sentencing jury may shift its sense of responsibility to an appellate court.") (emphasis added).

This Court has addressed whether or not error under *Hurst v. Florida* is harmless in cases where the jury did not unanimously recommend a death sentence. This Court stated in *Dubose v. State*, 210 So. 3d 641, 656 (Fla. 2017), "We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless." *See also Smith v. State*, 213 So. 3d 722 (Fla. 2017); *Hodges v. State*, 213 So. 3d 863 (Fla. 2017); *Brooks v. State*, Florida Supreme Court Case No. SC16-532 (Order March 10, 2017); *Anderson v. State*, SC12-1252 (March 9, 2017); *Ault v. State*, 213 So. 3d 670 (Fla. 2017); Hojan v. State, 212 So. 3d 982 (Fla. 2017); *Wood v. State,* 209 So. 3d 1217 (Fla. 2017); *Durousseau v. State*, ___ So. 3d ___, 2017 WL 411331 (Fla. Jan. 31, 2017)*; McGirth v. State*, 209 So. 3d 1146 (Fla. 2017); *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017); *Williams v. State*, 209 So. 3d 543 (Fla. 2017)*; Armstrong v. State*, 211 So. 3d 864 (Fla. 2017); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)*; Hurst v. State*, 202 So. 3d 40, 69 (Fla 2016); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016); and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016). Thus, the State cannot show beyond a reasonable doubt that the *Hurst* error in Mr. Peterka's case was harmless.

Mr. Peterka's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, Chapter 2017-1, and *Hurst v. State*. His jury did not return a verdict making any findings of fact, his jury was not instructed that its death recommendation had to be unanimous, the jury's death recommendation was not unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

Mr. Peterka's death sentence must be vacated and he must be provided a constitutionally sound sentencing proceeding.

CONCLUSION

In light of the foregoing arguments, this Court must vacate Mr. Peterka's death sentence and at a minimum order a resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic service to Charmaine M. Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 30th day of May, 2017.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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