IN THE FLORIDA SUPREME COURT
Case No. SC17-971
Lower Court Case No: 1989-7632, 1990-1995, 90-6668

KONSTANTINIOS X. FOTOPOULOS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW the Appellant, Konstantinos X. Fotopoulos, by and through the undersigned attorneys, and in response to this Court's order dated September 27, 2017, shows cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445, as follows:

PROCEDURAL HISTORY

Mr. Fotopoulos and co-defendant Deidre Hunt were indicted for two counts of first degree murder and other charges. In separate proceedings, both were sentenced to death by the trial court. This Court affirmed Mr. Fotopoulos' convictions and death sentences on appeal. This Court reversed Ms. Hunt's death sentence. *Hunt v. State*, 613 So.2d 893 (Fla. 1992). Before proceeding to a new penalty phase, the trial court granted her a new guilt phase as well. *State v. Hunt*, 687 So.2d 851(Fla.5th DCA1997). Ms. Hunt was convicted but not sentenced to death following retrial. *Hunt v. State*, 753 So.2d 609 (Fla. 5th DCA 2000).

Mr. Fotopoulos was convicted of two counts of first-degree murder, conspiracy to commit first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first degree murder, and one count of burglary of a dwelling while armed. The advisory panel recommended death by 8-4 votes on each. The trial court imposed a death sentence for each murder. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of an individual factual determination by a jury.

Mr. Fotopoulos appealed his judgment of conviction and death sentences to this Court. The Court affirmed the judgment of conviction and death sentences on appeal. *Fotopoulos v. State*, 608 So.2d 784 (Fla.1992). The United States Supreme Court denied certiorari. *Fotopoulos v. Florida*, 508 U.S. 924 (1993).

Mr. Fotopoulos sought postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 in the trial court. The trial court denied relief and Mr. Fotopoulos appealed and filed a state petition for a writ of habeas corpus. This Court affirmed the denial of postconviction relief and denied the petition. *Fotopoulos v. State*, 838 So.2d 1122 (Fla. 2002).

Mr. Fotopoulos raised in postconviction that the State presented inconsistent theories of prosecution in Mr. Fotopoulos' trial and Ms. Hunt's trial, respectively. Mr. Fotopoulos sought relief in United States District Court by filing a Petition for a

Writ of Habeas Corpus. The district court granted the petition in part and denied it in part. The district court granted penalty phase relief in part on what the court characterized as claims 10(d) and 11(g). The district court shared Justice Lewis':

> "grave concerns as to the State's conduct during the trials of the separate but related Hunt and Fotopoulos charges." *Fotopoulos*, 838 So.2d at 1137 (Lewis, J., concurring in result only). The United States Supreme Court has long recognized that a prosecutor's preeminent duty is not to win a case, but to that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). As a representative of the sovereign, a prosecutor must earnestly and vigorously prosecute actions; however, "while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper method calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*.

The district court then found:

> In the instant case, it is clear that the State presented starkly inconsistent positions as to Ms. Hunt's relative culpability in the crimes. During her initial sentencing proceedings, the State vigorously argued that she was a cold-blooded, premeditated murderer who was not dominated or coerced by anyone. In contrast, at Petitioner's trial, the State presented evidence that he dominated and controlled Ms. Hunt to the point that she was essentially a "battered woman."
>
> Based on the testimony at the Rule 3.850 hearing, there can be no doubt that Petitioner's trial counsel had ample bases upon which to establish the inconsistencies in the State's positions regarding Ms. Hunt's relative culpability.

Specifically, on the ineffectiveness of trial counsel, the district court found that trial counsel's "failure to focus on the State's inconsistent portrayal of Ms. Hunt was not a 'strategic

decision.'" Instead the court found that it was an inexplicable decision "to ignore or abandon a critical opportunity to impeach the State's case . . .."

For the district court, the "critical issue" was Mr. Fotopoulos' "relative culpability from a sentencing standpoint." The jury which "'knew' Ms. Hunt had been dominated by [Mr. Fotopoulos]" and still had received the death penalty, "had little rational choice but to impose the same penalty on [Mr. Fotopoulos]." This "had a profound impact on {Mr. Fotopoulos'] jury." "Even so, the jury vote to impose death was eight to four -- a two vote swing between life and death." In concluding that the first prong of *Strickland v. Washington*, 466 U. S. 668 (1984), had been met, the district court stated that Mr. Fotopoulos':

> [D]ominant role in the murders was a major theme of the State's case against him, especially in relation to the death sentence. Yet, defense counsel failed to exploit the blatantly inconsistent evidence offered by the State in Ms. Hunt's case. Had defense counsel done so, it would not only have impeached Ms. Hunt's testimony, it would have brought into question the integrity and credibility of the prosecution itself. There can be no more powerful defensive tactic than the impeachment of one's opponent. And defense counsel offered no particular explanation for declining to do so. Thus, it cannot be said that this was a mere strategic decision. Rather, it was a critical failure, and like Justice Lewis, this Court finds trial counsel's failure to pursue this line of attack to be outside prevailing professional standards. *Fotopoulos*, 838 So. 2d at 1139 (Justice Lewis concurring in result only). Therefore, the first prong of *Strickland* has been satisfied, and the state courts' determination to the contrary was objectively unreasonable.

The court noted that:

> The powerful impact of such an approach is underscored by the state trial judge's findings regarding Ms. Hunt's resentencing. In determining that Ms. Hunt had established the mitigating circumstance of extreme duress or the substantial domination of another person, the trial court stated that the "defense offers as further evidence and virtual admissions by the State of this mitigating circumstance, statements made by the prosecution during the Fotopoulos trial . . ." (Doc. No 44, May 7, 1998, Judgment and Sentence of Deidre Michelle Hunt at 1220).

While the district court's discussion of the first prong of *Strickland* showed prejudice, the court added further analysis. The district court found that it was:

> at least reasonably probable that the presentation of the State's "blatantly inconsistent evidence and arguments," *Fotopoulos*, 838 So. 2d at 1139 (Lewis, J., concurring in result only), would have fundamentally changed the calculus concerning [Mr. Fotopoulos'] sentence. The prosecution's closing argument at least implied that Ms. Hunt received the death penalty *because* of Petitioner's actions. Ms. Hunt was portrayed as yet another victim - - not only had Petitioner abused and terrorized her, he was now, in essence responsible for her death as well. And if Petitioner's "victim" was being sentenced to death, how could any jury be expected not to sentence him to death as well?

The district court noted that during closing argument the prosecutor stated, "'Deidre Hunt is much like the person who has a bullet put to their chest and is lying there bleeding to death and knowing that she is about to go down to the count, points that accusing finger to the person that put her where she is.'"

On Ground 11(g) the district court found that this issue was properly raised in Mr. Fotopoulos' amended 3.850 motion in claim

III and exhausted on appeal. On appeal the Florida Supreme Court affirmed the trial court's denial.

The district court also granted relief on Claim 11(g). The court relied upon the inconsistencies discussed above and held that the prosecutor's misconduct in this regard was a due process violation which prejudiced Mr. Fotopoulos' right to a fair sentencing procedure. When the district court considered the State's "markedly inconsistent positions" in the context of Mr. Fotopoulos' penalty phase proceedings the district court concluded: "that the inconsistencies were at the core of the State's penalty phase case and rendered Petitioner's death sentences unreliable." The district court found that "the prosecutor's misconduct regarding this matter amounted to a due process violation which prejudiced Petitioner's right to a fair sentencing procedure."

The State appealed to the United States Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit reversed the district court. *United States Court of Appeals, Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229 (11th Cir. 2008). Mr. Fotopoulos petitioned the United States Supreme Court for a Writ of Certiorari to the Eleventh Circuit, which the Court denied. *Fotopoulos v. McNeil*, 555 U.S. 899, 129 S. Ct. 217 (2008).

Following *Hurst v. Florida*, Mr. Fotopoulos filed a Successive Motion to Vacate Judgment and Sentence based on *Hurst*, *Hurst v. State* and issues derived therefrom. The trial court denied Mr.

Fotopoulos's motion. The postconviction court found:

> The Florida Supreme Court has held that *Hurst*, which implicated *Ring* and *Apprendi*, should not be applied retroactively to defendants whose death sentences became final before the issuance of *Ring*, or before June 24, 2002. *Asay v. State*, 210 So. 3d .1, 22 (Fla. 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017). In the instant case, Defendant's death sentence became final on May 17, 1993, when the United States Supreme Court denied Defendant's petition for writ of certiorari. Thus, Defendant is not entitled to relief under *Hurst* because his sentence became final before *Ring*.
>
> The undersigned judge has the utmost respect and admiration for the highest court of the state and is legally duty-bound to follow the law as specified in *Asay*. The undersigned judge, however, agrees with the dissenting opinions of Justice Pariente and Justice Perry in *Asay*, in that *Hurst* should be applied retroactively to all death sentences considering the finality of death and that "death is different." The retroactive application of *Hurst* to a certain date results in an arbitrarily drawn line for death sentences which became final before and after June 24, 2002. Nonetheless, as an officer of the court, I must follow the law of the land.

Record on Appeal at 47

This Court stayed briefing pending a decision in *Hitchcock v. State*. On September 22, 2017, this Court required Mr. Fotopoulos to "show cause on or before Thursday, October 17, 2017, why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445."

REQUEST FOR ORAL ARGUMENT

The issues in this case are important to the constitutionality of the death penalty in Florida. This case presents ongoing

questions of the overall constitutionality of Florida's death penalty and many discrete issues that were hidden below the surface until *Hurst v. Florida* and *Hurst v. State* brought these issues to light. This Court did not allow oral argument in *Hitchcock v. State* which left numerous issues unresolved.

The extent of the precedential value of the majority opinion in *Hitchcock*, its effect on the just determination of important claims of constitutional violation, and the death penalty itself in Florida, is out of balance with the process that occurred in *Hitchcoc*k. Mr. Fotopoulos has a right to argue in full briefing that *Hitchcock* was wrongly decided.

This Court has always placed importance on oral argument. The truncated procedure that occurred in Mr. Hitchcock's case, and the majority opinion, despite the importance of the issues, is insufficient to instill confidence in the ongoing constitutionality of Florida's death penalty. Lower court judges, attorneys and, indeed, those who take an interest in the functioning of the death penalty, are entitled to have the issues presented by Mr. Fotopoulos fully heard and fully decided by this Court. So is Mr. Fotopoulos.

FULL BRIEFING AS PART OF A FAIR APPELLATE PROCESS IS NECESSARY TO COMPLY WITH FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

Denying full appellate briefing denies Mr. Fotopoulos the right to habeas corpus, due process and access to the courts under

the Florida Constitution and the United States Constitution. Florida's legal system promotes the right to appeal as a matter of resolving serious legal questions that need to be confronted. Briefing is essential to this function. The Florida Constitution references the right to appeal and habeas corpus in a number of provisions. Under the Florida Constitution, Article I, Section 13, provides,

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Under the Florida Constitution, Article I Section 9, provides,

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

Under the Florida Constitution, Article I Section 21, provides,

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article V Section 3(b)(1), goes on to provide that this Court "Shall hear appeals from final judgments of trial courts imposing the death penalty . . .." Sub-Section 9 also provides that this Court, "May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge."

The Florida Rules of Appellate Procedure detail the

"Procedures for Review in Death Penalty Cases" in Rule 9.142. Rule 9.142(a)(2) provides, "On appeals from orders ruling on applications for relief under Florida Rule of Criminal Procedure 3.851 or 3.853, and on resentencing matters, the schedules set forth in rule 9.140(g) will control." Rule 9.140(g)(1) provides,

> Brief on the Merits. Initial briefs, including those filed pursuant to subdivision (g)(2)(A), shall be served within 30 days of transmission of the record or designation of appointed counsel, whichever is later. Additional briefs shall be served as prescribed by rule 9.210.

Rule (g) requires appointed counsel to file an *Anders* Brief and further briefing if the Court finds "an arguable issue . . ." *See* Rule 9.140(g)(2).

Florida Rule of Criminal Procedure (f)(8) provides,

> Any party may appeal a final order entered on a defendant's motion for rule 3.851 relief by filing a notice of appeal with the clerk of the lower tribunal within 30 days of the rendition of the order to be reviewed. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.142, a defendant under sentence of death may petition for a belated appeal.

In Florida, postconviction and appeals are an essential part of the death penalty system. It is only through a complete process that this Court can fulfill its vital rule of ensuring that the death penalty is carried out constitutionally. Mr. Fotopoulos seeks full briefing to be heard as part of this process.

The United States Supreme Court has repeatedly recognized the importance of fair appeals. In the context of an appeal as a matter

of right, the United States Supreme Court held in *Anders v. State of Cal*., 386 U.S. 738,87 S. Ct. 1396 (1967) that,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.

Id. at 744, 1400. Denying full briefing denies Mr. Fotopoulos the opportunity have "an active advocate" plead his case.

The United States Supreme Court found it violated the Due Process Clause and the Equal Protection Clause for a state to deny the indigent a transcript to seek appellate review. *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956). The Court found,

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., *McKane v. Durston*, 153 U.S. 684, 687—688, 14 S.Ct. 913, 914—915. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. 18, 590. Like Illinois' appeal, Florida's postconviction process, which includes appeal, has become an integral part of the functioning of Florida's death penalty system.

In *Eskridge v. Washington State Bd. of Prison Terms & Paroles*,

357 U.S. 214, 78 S. Ct. 1061 (1958), the United States Supreme Court addressed the State of Washington's procedure of only allowing for a transcript for an indigent appellant at public expense if the trial judge found that "justice [would] thereby be promoted." *Id.* at 215. The trial judge found that it would not. *Id*. Based on *Griffin*, *supra*, the Court found that this denied the petitioner's right to appeal without regard to indigent status. *Id*. The Court explained,

> The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript. We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But [ ] we do hold that, '(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' *Griffin v. People of State of Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 591.

Id. at 216, 1062. The use of this Court's order to show cause procedure to deny full appellate review is as inadequate of a procedure as in *Griffin*.

In *Douglas v. People of State of Cal.,* 372 U.S. 353, 83 S. Ct. 814 (1963), the petitioners were denied the assistance of counsel on appeal, despite appearing indigent, after the appellate court had "'gone through' the record and had come to the conclusion that 'no good whatever could be served by appointment of counsel.'" *Id.* at 354-55, 814, 815. The intermediate appellate court was required to do so under a California rule of criminal procedure.

On Supreme Court review, the Court was not "concerned with the problems that might arise from the denial of counsel for the preparation of a petition for discretionary review or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court" and was concerned with "the first appeal, granted as a matter of right . . .." *Id*. at 356, 815. The Court held that "[w]hen an indigent is forced to run this preliminary showing of merit, the right to appeal does not comport with fair procedure" and vacated the judgment. *Id*. at 358, 817. The Court concluded that,

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id.

Unlike in *Anders*, *Griffin*, *Eskeridge* and *Douglas,* Mr. Fotopoulos has both counsel and a transcript. While postconviction appeal may not be required as a matter of federal constitutional right, see *Evitts v. Lucey*, 469 U.S. 387, 408, 105 S. Ct. 830, 842 (1985), the Florida Constitution, statutes and rules of criminal procedure establish it as a matter of right. At issue is simply

whether Mr. Fotopoulos will receive the same opportunity to convince this Court of the merits of his issues as everyone seeking relief under Florida Rule of Criminal Procedure 3.851 receives. For no reason other than apparent expediency, Mr. Fotopoulos will not have the same opportunity to convince this Court of the merits of issues if he is not allowed full briefing. This Court routinely provides for extensive briefing in cases in which a death sentenced individual wishes to waive all postconviction. On direct appeal, someone may have no meritorious issues or not wish to pursue the appeal, yet this Court requires briefing. Mr. Fotopoulos waives no issue and seeks to present full briefing.

Based on *Eskridge*, a court may not deny a full appeal when there is a right to one based on the decision of an intermediary. Should this Court decide that full briefing is not necessary, it will be engaging in the same type of intermeddling that was constitutionally offensive in *Eskridge* and *Douglas*. Deploying a procedure that screens out cases from full briefing usurps the role of postconviction counsel acting as an advocate as required by *Anders*. Such a lesser procedure deployed in the interest of expediency provides less due process than someone wishing to waive appeal when at issue in Mr. Fotopoulos's case are the implications of the most important constitutional decision in Florida since *Proffitt v. Florida*, 428 U.S. 242 (1976).

The United States Supreme Court found that the death penalty

system under which Mr. Fotopoulos was tried was unconstitutional. As far as the issue of *Hurst v. Florida* is concerned, Mr. Fotopoulos starts his appeal with a decision of the United States Supreme Court that his rights were violated. Mr. Fotopoulos, like every individual sentenced to death before the United States Supreme Court issued *Hurst,* was sentenced to death under an unconstitutional system. Beyond that, Mr. Fotopoulos has additional issues that this Court has yet to decide. Full briefing is necessary to settle these issues and allow the death penalty system in Florida to function constitutionally.

Denying full briefing is a violation of the right to Due Process and Equal Protection under the Florida and United States Constitution, and a violation of the right to seek habeas corpus. This Court has long held that due process requires an individual determination in a case. In *Herring v. State*, 580 So. 2d 135 (Fla. 1991) this Court found that,

> due process principles do not allow the trial judge to adopt factual findings made in a prior case involving a different defendant, even though it concerns the same issue. Herring must be afforded an opportunity to present evidence and examine and cross-examine witnesses on this issue. Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter.

Id. at 139 (Fla. 1991). While Mr. Fotopoulos seeks appellate briefing and not an evidentiary hearing, the principle that each

case requires an individual determination should apply to his case. This Court should allow Mr. Fotopoulos an individualized proceeding that allows him to fully be heard through counsel with full briefing.

Postconviction counsel, and the entire postconviction process, serves an important role in ensuring that the death penalty is imposed constitutionally and fairly in Florida. While the full rights of an appeal may not extend to postconviction appeals, the right to habeas corpus, equal protection and due process, and access to the courts requires that this Court allow Mr. Fotopoulos to present his arguments in full briefing.

MR. FOTOPOULOS HAS EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FULL BRIEFING.

The advisory panel recommended the death penalty 8-4. The error in Mr. Fotopoulos' case was not harmless. In addition to the State being unable to obtain a unanimous advisory panel recommendation, the State was only able to obtain the 8-4 recommendation based on the use of inconsistent theories of prosecution. As the district court found in granting habeas relief, it was "at least reasonably probable that the presentation of the State's 'blatantly inconsistent evidence and arguments,' *Fotopoulos*, 838 So. 2d at 1139 (Lewis, J., concurring in result only), would have fundamentally changed the calculus concerning [Mr. Fotopoulos'] sentence." Accordingly, Mr. Fotopoulos should be

allowed full briefing to argue that these circumstances require relief.

THIS COURT SHOULD NOT AFFIRM THE LOWER COURT BASED ON HITCHCOCK BECAUSE HITCHCOCK WAS DECIDED WRONGLY BY THE MAJORITY AND FAILED TO ADEQUATELY ADDRESS THE CLAIMS THAT MR. HITCHCOCK AND MR. FOTOPOULOS RAISED. MR. FOTOPOULOS WAIVES NO ISSUES.

Like Mr. Hitchcock, Mr. Fotopoulos has raised issues that go well beyond the simple Sixth Amendment issue addressed by the United States Supreme Court in *Hurst v. Florida*. Mr. Fotopoulos would attempt to convince this Court on appeal of the merits of the following claims and unequivocally asserts and preserves the following:

1. To deny Mr. Fotopoulos retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Fotopoulos's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420

(1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

2. Mr. Fotopoulos was denied his right to a jury determination of the facts that subjected him to the death penalty in violation of the Sixth and Fourteenth Amendments to the United States Constitution as found by the United States Supreme Court in *Hurst v. Florida* and by this Court in *Hurst v. State*. This Court is required to retroactively apply *Hurst* and *Hurst v. Florida* under the Supremacy Clause of the United States Constitution. Under Florida's standard for retroactivity under *Witt v. State*, this Court's decision in *Hurst v. State* and *Mosely v. State* that involved the Eighth Amendment and the right to unanimous juries in Florida, should also be retroactive.

3. Denying retroactive application of *Hurst* and *Hurst v. State* based on the date of *Ring* has rendered Mr. Fotopoulos's death sentence arbitrary and capricious and beyond evolving standards of decency in violation of the Eighth and Fourteenth Amendments to the United States Constitution. There is no meaningful difference between Mr. Fotopoulos's case and those cases after *Ring*.

Mr. Fotopoulos's death sentence no longer reflects that his case is one of the most aggravated and least mitigated. With the greater procedures that followed *Hurst v. State*, the standards of decency in Florida have evolved to limit death to cases in which a unanimous jury is required to find that the State has proved each aggravating factor beyond a reasonable doubt, that the

aggravating factors outweigh the mitigating factors and that death should be imposed. Mr. Fotopoulos had none of these findings in his case. This Court's retroactivity split has left behind cases that would not have received death if tried under the current death penalty scheme in Florida because the State would not be able to meet its burden of proof to a jury or because better mitigation would be presented under today's knowledge and understanding.

4. Mr. Fotopoulos raised in his motion, and preserves here,

> Mr. Fotopoulos raised claims in his postconviction motion that were adjudicated under an unconstitutional system. In applying the law to the facts raised in Mr. Fotopoulos' postconviction motion, this Court determined Mr. Fotopoulos' ineffective assistance of counsel claims, and other claims, based on the constitutionally incorrect analysis that it was the judge that was required to, and did, make the findings of fact. In light of *Hurst*, Mr. Fotopoulos incorporates his previous postconviction claims filed under Florida Rule of Criminal Procedure 3.851and denied by this Court. This Court should rehear Mr. Fotopoulos' previously denied claims and vacate Mr. Fotopoulos' death sentences.

The Eleventh Circuit reversal of the district court's grant of habeas relief was based on at arduous standards for federal habeas relief. When this Court affirmed the denial of postconviction relief and denied the State habeas petition, it did so under an unconstitutional system where the responsibility of determining the facts that subjected Mr. Fotopoulos to death was that of the trial judge. With a mere 8-4 recommendation, the impact of the inconsistent theories and whether constitutional error occurred, was fundamentally altered by *Hurst* and *Hurst v. State*.

Reconsideration is necessary for due process under the Florida and United States Constitutions. Mr. Fotopoulos should be allowed to further develop these arguments with full briefing.

5. Mr. Fotopoulos was entitled have each aggravating factor, that the aggravating factors outweigh the mitigating factors and that death should be imposed proven beyond a reasonable doubt. The jury trial of *Hurst* and *Hurst v. State* mandates that the State prove each element beyond a reasonable doubt. Mr. Fotopoulos was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. The denial of Mr. Fotopoulos's right to proof beyond a reasonable doubt violates his right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, and jury trial under the Sixth Amendment.

6. Mr. Fotopoulos's rights under the Florida Constitution were denied because the aggravating factors were not charged in an indictment following proper findings by a grand jury and proper notice under Article I, Section 15(a), Article I, Section 16(a) of the Florida Constitution. To deny Mr. Fotopoulos these rights under the Florida Constitution is to deny Mr. Fotopoulos equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

This Court should allow full briefing and oral argument.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to all counsel of record and the assigned judge on October 17, 2017.

S/JAMES L. DRISCOLL JR
JAMES L. DRISCOLL JR.
Fla. Bar No. 0078840
driscoll@ccmr.state.fl.us

DAVID DIXON HENDRY
DAVID DIXON HENDRY
Fla. Bar No. 0160016
hendry@ccmr.state.fl.us

S/GREGORY W. BROWN
GREGORY W. BROWN
Florida Bar No.86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600