

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC 18-16**

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**MICHAEL LEE ROBINSON**

**Appellant,**

**v.**

**STATE OF FLORIDA**

**Appellee.**

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

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**INITIAL BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

This is an appeal of the circuit court’s denial of Robinson’s successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Robinson never waived his right to a penalty phase jury and was sentenced to death in violation of the Sixth and Eighth Amendments. The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), held that the Sixth Amendment “in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.” *Hurst*, 136 S. Ct. at 621. That did not happen in Robinson’s case. The issues in this case are whether: (1) whether Robinson ever waived his right to a penalty phase jury, and if so, whether this Court will continue to deny defendants who did waive a penalty phase jury *Hurst* relief; and (2) whether this Court will continue to apply its unconstitutional “retroactivity cutoff” to deny Robinson *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant’s sentence became final after *Ring*. But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral

review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Robinson because he never waived his right to a penalty phase jury. Denying Robinson *Hurst* relief because he allegedly waived his right to a penalty phase jury and/or because his sentence became final in 1999, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Robinson is also entitled to *Hurst* retroactivity as a matter of federal law.

### **CITATIONS**

Citations shall be as follows: The record on appeal from Robinson’s first trial proceedings shall be referred to as “TR1” followed by the appropriate volume and page numbers. The record on appeal from Robinson’s second trial proceedings shall be referred to as “TR2” followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as “PC” followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as “R” followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

## **QUESTION PRESENTED BY THE COURT**

In its Order dated Friday, February 23, 2018, this Court directed the parties to file briefs to specifically address why the Court should not affirm the lower court's order in light of *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In this brief, Robinson will first address the Court's question. *See* Argument I, *infra*. Then, Robinson will preserve for appellate review his arguments regarding the retroactive applicability of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to his sentencing. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see* Argument II, *infra*. Due to the truncated nature of the briefing, all claims not specifically argued from Robinson's successive motion are not waived and expressly incorporated herein.

## **REQUEST FOR ORAL ARGUMENT**

A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Robinson respectfully requests that this Honorable Court permit oral argument.

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## STATEMENT OF THE CASE

### I. Trial Court Proceedings

On January 23, 1995, Robinson pled guilty to first-degree murder and waived a penalty phase jury. (TR1 4:255). The trial court imposed a sentence of death on April 12, 1995. (TR1 1:35; 3:107). Robinson asked for the death penalty and requested that no mitigating factors be considered by the trial court. (TR1 1:25). On appeal, this Court vacated his sentence and remanded the case because “the trial court failed to consider and weigh evidence of substantial mitigation found in the record.” *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). This substantial mitigating evidence included: Robinson’s two psychiatric and clinical evaluations; his history of various psychological “disturbances”; a “lifelong history of apparent mental health problems”; and Robinson’s mental functioning which may have been impaired due to several brain injuries. *Id.* at 179-80.

In its opinion, this Court remanded the case “to the trial court to conduct a new penalty phase hearing before the judge alone.” *Id.* at 180. This Court did not remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), which would not have granted Robinson the same rights as do plenary sentencing proceedings. Rather, this Court remanded for a new, plenary penalty phase hearing.

### II. Second Penalty Phase Proceedings

Upon remand, Robinson attempted to withdraw his guilty plea, but trial counsel’s

oral motion to withdraw the plea was denied. (TR2 2:17-18). The State argued at the new penalty phase that it did not have to again prove any aggravation because this was merely an opportunity for the defense to put on mitigating evidence and for the trial court to reweigh all of the aggravation and mitigation. (TR2 18-19, 24). In opposition, trial counsel argued that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase “is not a rubber stamping, [that] this is a new hearing.” (TR2 2:20-21, 25). Prior to the start of the new penalty phase, there was no plea colloquy or any questioning of Robinson regarding whether or not he still wished to waive a penalty phase jury. The trial court sentenced Robinson to death, without the benefit of a jury, in violation of his Sixth Amendment right, on August 15, 1997. (TR2 3:260).

On direct appeal, Robinson challenged the trial court’s denial of his counsel’s oral motion to withdraw his guilty plea. *Robinson v. State*, 761 So. 2d 269, 273-74 (Fla. 1999). This Court denied his appeal and affirmed his conviction and sentence. *Id.* at 274-75, 279. The Supreme Court of the United States denied certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057 (2000).

### III. Postconviction Proceedings

On February 21, 2001, Robinson filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. (PC 1:104-136). Robinson filed his final amended Rule 3.850 motion on October 10, 2001. (PC 1-2:192-259). Without

the benefit of *Ring* or *Hurst*, Robinson challenged Florida's capital sentencing scheme based on similar principles enunciated in those cases. (PC 2:233-38). He also argued that he did not "voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury, and the trial court's inquiry on the purported waiver was constitutionally inadequate." (PC 2:239).

An evidentiary hearing was conducted on January 29-30, 2003. (PC Supplemental 1:1-178). A final order denying relief was issued on May 15, 2003. (PC 3:540-60).

On appeal in his state habeas petition, Robinson argued: (1) this Court's decision on direct appeal precluding him from seeking a penalty phase jury was error, and appellate counsel unreasonably failed to bring this matter to the court's attention, thereby rendering ineffective assistance of counsel; and (2) Florida's capital sentencing statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Petition for Writ of Habeas Corpus Case No. SC04-772. This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Robinson v. State*, 913 So. 2d 514 (Fla. 2005).

On September 18, 2017, Robinson filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R 121-46). The State filed a response on October 9, 2017. (R 164-87). A case management conference was held on October 27, 2017. (R 266-94). The lower court denied Robinson's motion on November 8,

2017. (R 209-14). Robinson filed a timely motion for rehearing on November 27, 2017, which was denied on November 30, 2017. (R 224-27). This appeal follows.

### **STANDARD OF REVIEW**

The standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). The lower court's rulings are reviewed *de novo* and deference is given to factual findings supported by competent and substantial evidence. See *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

### **SUMMARY OF ARGUMENTS**

**ARGUMENT I:** Robinson never waived his right to a penalty phase jury after this Court remanded his case for a new penalty phase. Second, even if Robinson did validly waive a penalty phase jury, despite this Court's precedent in *Mullens*, Robinson could not waive a right that was unconstitutionally withheld from him. On its face, such a waiver could never be knowing, voluntary and intelligent. Robinson submits that he is entitled to *Hurst* review and relief.

**ARGUMENT II:** Despite this Court's precedent in *Asay*, Robinson continues to argue that he is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*. To deny Robinson *Hurst* review is a violation of his Sixth, Eighth, and Fourteenth Amendments rights, a violation of his equal protection rights, and a fundamentally unfair and arbitrary application by this Court.

**ARGUMENT I: Robinson never waived his right to a penalty phase jury, and even if he did so, he could not validly waive a right that was unconstitutionally withheld from him.**

**A. Robinson never waived his right to a penalty phase jury during his second penalty phase.**

When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of the right. The individual must be fully informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Robinson's colloquy during his first trial. Nor did Robinson ever knowingly, voluntarily and intelligently waive his right to a penalty phase jury after this Court remanded his case for a new penalty phase.

During Robinson's first trial, the trial court conducted a limited colloquy as to Robinson's guilty plea but never conducted a colloquy as to his waiving a penalty phase jury. (TR1 1:5-36, 41-42). The only questioning regarding Robinson waiving his right to a penalty phase jury by the trial court was as follows:

Court: Are the defense and the state waiving any jury for the penalty phase?  
Mr. Culhan: The Florida Supreme Court has recently said the State has nothing to say about that.  
Court: Then the defense?  
Mr. Irwin: We would be waiving the jury for the penalty phase, judge.  
Court: Have you talked to him about that?  
Mr. Irwin: Yes, we have.  
Defendant: I have stated that earlier.  
Court: You don't want a jury for the penalty phase?  
Defendant: I don't feel I need it. I think if you – contingent on - can

you return a penalty phase of death by that?  
Court: I've done it before.  
Defendant: That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.  
Court: To recommend a sentence?  
Defendant: That is correct.

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Court: Mr. Robinson has already pled to first degree murder and I understand he did not want to have a jury for the recommendation. Is that still the case?  
Mr. Irwin: That's correct, your honor.  
Court: Mr. Robinson, is that true? You don't want a jury?  
Defendant: Yes, ma'am, that's correct.  
Court: And have you talked to your lawyers about that again and you still think that that's the way you want to go, without a jury?  
Defendant: Yes, ma'am. They came to the jail yesterday and interviewed me and we discussed it and that's correct, I still wish to go without a jury.

(TR1 1:32-33, 41-42).

Unlike in *Mullens*, it cannot be said that the above colloquy demonstrated that Robinson was “made aware of the dangers and disadvantages of [waiving a jury], so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta v. California*, 422 U.S. 806, 835-36 (1975) (internal citations omitted). See *Mullens v. State*, 197 So. 3d 16, 39 (Fla. 2016), reh'g denied, cert. denied, 137 S. Ct. 672 (2017) (“The trial court conducted a thorough colloquy and asked Mullens if he understood the right that he was relinquishing and that he was subject to sentences of either death or life imprisonment.”). The trial court in *Mullens* warned Mullens no less than four times about the dangers of waiving a penalty phase jury and its sentencing recommendation. See *Mullens v. State*, SC13-1824, ROA

15:2261-64. After the fourth warning, Mullens stated, “Sir, it seem[s] like you keep asking the same thing like I'm making the wrong decision or something.” *Id.* at 2264. Robinson received no such admonition.

The importance of a thorough colloquy is especially evident now in our post-*Hurst* landscape. The meager questioning done by the trial court in Robinson’s case composes less than four pages of the transcript and is not the unequivocal waiver of a right after having been informed as to all of the dangers and disadvantages of waiving that right.

Second, after the Florida Supreme Court vacated and remanded Robinson’s case for a new penalty phase, *he never waived his right to a penalty phase jury*, and neither trial counsel nor the trial court ever asked Robinson on the record whether he wanted a penalty phase jury. Robinson maintains that this Court, when it vacated his original death sentence, remanded his case for a new, plenary penalty phase proceeding rather than a mere reweighing of the aggravating and mitigating circumstances. Trial counsel argued at the second penalty phase that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase “is not a rubber stamping, [that] this is a *new hearing*.” (TR2 2:20-21, 25) (emphasis added).

This Court has held that if there is judicial discretion as to what new sentence could be imposed, this eliminates the ministerial nature of the resentencing and makes it a completely new proceeding. *Jordan v. State*, 143 So. 3d 335, 339-40 (Fla. 2014). *See*

also *Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997) (holding that a resentencing proceeding was a “completely new proceeding,” and the trial court was therefore under no obligation to make the same findings as those made in Phillips’ prior sentencing proceeding); and *Hartley v. State*, 175 So. 3d 757 (Fla. 2015) (a trial court’s prior findings no longer stand, especially given that a trial court is not obligated to make the same findings on resentencing as at the original sentencing). The trial court in this case clearly had discretion over what new sentence to impose on Robinson and was under no obligation to impose the death penalty again. Further, the new penalty phase involved additional considerations and involved more sentencing discretion than the first penalty phase. This Court made clear on remand that the trial court must take into consideration the wealth of mitigating evidence in Robinson’s case which it ignored the first time, and, during the second penalty phase, Robinson allowed his trial counsel to present a plethora of new mitigating evidence which was not previously presented. Thus, his new penalty phase was a completely new proceeding and the failure to empanel a penalty phase jury, or perform the required colloquy to see if Robinson still wanted to waive his right to a jury, was a violation of Robinson’s Sixth Amendment rights.

Robinson had the right to decide anew whether or not he wished to have a penalty phase jury and/or to knowingly, voluntarily, and intelligently waive that right. Robinson was given no such choice, despite the fact that, as this Court noted in the

appeal from the resentencing, Robinson had “changed his mind and no longer wish[ed] to die.” *Robinson v. State*, 761 so. 2d 269, 275 n.5 (Fla. 1999).

Robinson preserved this argument and challenged his denial of a penalty phase jury in his initial Motion to Vacate Judgment and Sentence in Claim XI. (PC 2:239). The circuit court denied this claim finding that it was procedurally barred because it was raised on direct appeal and ruled upon by the Florida Supreme Court. (PC 3:554). That holding is incorrect. Robinson only challenged the denial of his motion to withdraw his *guilty plea* on direct appeal – Robinson did not challenge the lack of a penalty phase jury. *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999). To date this Court never ruled on whether or not his waiver of a *penalty phase jury*, on remand, was valid – or if he ever waived one at all. Robinson also raised this issue in his state habeas petition.

Should this Court determine that the trial court was bound by this Court’s wording that the new penalty phase hearing be before “the judge alone,” *Robinson*, 684 So. 2d at 180, this Court violated Robinson’s Sixth Amendment right to a jury, and this violation cannot now be used to preclude *Hurst* relief under *Mullens*. The Court’s opinion remanding the case should not have placed any restrictions on Robinson’s ability, at the resentencing, to invoke his right, or waive his right, to a jury at resentencing. The right to have his resentencing proceeding conducted before a jury and not a judge, is one of the most fundamental rights afforded a criminal defendant

under the Sixth Amendment. *See e.g., Ring v. Arizona*, 536 U.S. 584 (2002). “The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Thus, the Sixth Amendment reflects “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement.” *Id.* As the Supreme Court emphasized in *Sullivan v. Louisiana*, the “most important element” of the Sixth Amendment is “the right to have a jury, rather than a judge, reach the requisite finding of guilty.” 508 U.S. 275, 277 (1993) (citation omitted).

Because Robinson never waived his right to a penalty jury and since it was this Court’s unconstitutional pre-*Hurst* decision on appeal that unduly restricted Robinson’s ability to seek a jury determination at the penalty phase, he is excluded from the class of defendants not eligible for *Hurst* relief that this Court created in *Mullens*.

**B. Robinson could not constitutionally waive a right that was not afforded to him.**

Even if Robinson did validly waive his right to a penalty phase jury at his original sentencing, that waiver cannot now be used to deny him *Hurst* relief. A defendant cannot waive a right that was not yet recognized by the courts. *See Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v.*

*Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) (“It is axiomatic that a party cannot waive a right that it does not yet have.”); *Cruz v. Lowe’s Home Centers, Inc.*, No. 8:009-cv-1030-T-30MAP, 2009 WL 2180489, at \*3 (M.D. Fla. Jul. 21, 2009); cf. *Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not “inevitably waive all antecedent constitutional violations” and a defendant can still raise claims that “stand in the way of conviction [even] if factual guilt is validly established”). At the time of Robinson’s sentencing, Florida’s unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a sentence of death. Therefore, Robinson could never waive his right to a jury fact-finding and a requirement of a unanimous jury sentencing. See *Halbert*, 545 U.S. at 623; *Hurst v. Florida*, 136 S. Ct. 616; *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 (“the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.”). See also *Hurst v. State*, 202 So.3d at 62, n. 18. Robinson could not constitutionally waive a right that was not afforded to him.<sup>1</sup>

Should this Court determine that a defendant could waive his jury sentencing, even though the right did not exist, then this Court must inquire into the waiver colloquy.

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<sup>1</sup> This was made clear in the brief colloquy conducted by the trial court, where it asked Robinson if he wanted to waive the jury’s “recommendation.”

*See Mullens*, 197 So. 3d at 39; *see also Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010); *Rodgers v. Jones*, 3:15-cv-507-RH, ECF No.15 (N.D. Fla. Aug. 24, 2016). The Sixth Amendment provides that a defendant has a fundamental right to a jury trial. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). However, fundamental constitutional rights can be waived when a defendant so chooses. *See Boykin v. Alabama*, 395 U.S. 238 (1969). Nonetheless, an effective waiver of a constitutional right must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742 (1970). Further, the constitutionality or appropriateness of a waiver of a constitutional right, such as Robinson's Sixth, Fifth, and Fourteenth Amendment rights, must be unequivocal. The Supreme Court of the United States in *Faretta v. California*, 422 U.S. 806 (1975) demonstrated the detailed inquiry that is necessary to determine whether a criminal defendant has unequivocally waived his right to counsel. Specifically, our highest Court held:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242. Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively

shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure.

*Faretta*, 422 U.S. at 835-36 (internal footnote omitted). It should be noted just how detailed the colloquy was by the Court in *Faretta* to make sure that the defendant was not only aware of his rights, but also the court articulated the dangers of waiving his right. *See Pasha v. State*, 39 So. 3d 1259, 1261 (Fla. 2010) (quoting *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008) (“It is clear that ‘[b]efore the trial court can make a decision whether to permit the defendant to proceed *pro se*, the defendant’s request for self-representation must be unequivocal.”)). The importance of an appropriate and detailed colloquy cannot be understated when assessing whether a waiver of a constitutional right is valid. The Supreme Court of Florida clearly rejected an attorney’s written waiver on behalf of his client waiving his right to a jury trial because the record did not demonstrate that the waiver was knowing, voluntary, and intelligent. *See State v. Upton*, 658 So. 2d 86 (Fla. 1995). The Court held that:

[i]n the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly, voluntarily and intelligently waived his right to a trial by jury. We reject the State's alternative contention that the case should be remanded for an evidentiary hearing to determine whether Upton agreed with his attorney's waiver of a

jury trial. *See Williams*, 440 So.2d at 1291.

*Upton*, 658 So. 2d at 88, *approved sub nom. Johnson v. State*, 994 So. 2d 960, 963 (Fla. 2008) (“an oral waiver, which is preceded by a proper colloquy during which the trial judge focuses on the value of a jury trial and provides a full explanation of the consequences of a waiver, *see Tucker v. State*, 559 So.2d 218, 220 (Fla. 1990), is necessary to constitute a sufficient waiver. Further, a defendant’s silence does not establish a valid waiver of the right to a jury trial.”). Robinson’s colloquy cannot be seen as an unequivocal waiver of his jury sentencing rights because he was not advised of any of the pros or cons of his decisions. He was simply told that he is waiving the right to a jury recommendation. When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of those rights, having been informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Robinson’s colloquy that would satisfy denying him *Hurst* review. In its order, the lower court denied relief pursuant to this Court’s ruling in *Mosley v. State*, 210 So. 3d 1248, 1274 (Fla. 2016) citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and this Court’s ruling in *Mullens*. (R 211-12). With regard to the denial of relief based on *Mullens*, the lower court stated as follows:

Finally, the Florida Supreme Court has specifically held – in cases to which *Hurst* otherwise applies – that a defendant who waives a penalty phase jury is not entitled to relief under *Hurst* because he “cannot subvert the right to jury fact-finding by waiving that right and then suggesting that a subsequent

development in the law has fundamentally undermined his sentence.” *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016).

(R 212). While Robinson acknowledges this Court’s decision in *Mullens*, it is Robinson’s position that this Court’s decision has created an arbitrary class of defendants that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required by the Supreme Court of the United States in *Ring* and *Hurst*, simply because the defendant waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. This Court held that *Mullens* could not “avail himself of relief” pursuant to *Hurst v. Florida* because he waived an advisory jury recommendation for penalty phase and elected to be sentenced by the judge. *See Mullens*, 197 So. 3d at 38-40. The court cited *Blakely v. Washington*, 542 U.S. 296, 310 (2004), and concluded, “[N]othing prevents a defendant from waiving his *Apprendi* rights...If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.” 197 So. 3d at 38. Certainly, no waiver can ever be appropriate or valid in these cases. Especially, when the right being waived provided less protection than it does now, *i.e.* a minor-majority jury recommendation versus a unanimous jury fact-finding and ultimate decision-making.

The lower court never made specific findings regarding the thoroughness of the

colloquy concerning the waiver of jury sentencing. The court only made findings regarding Robinson's guilty plea. (TR1 1:35). The trial court's sentencing order simply stated:

[t]he Defendant waived a jury for an advisory sentence at the penalty phase of the proceedings and he waived presentation of any mitigators...The Defendant at every appearance appeared rational, competent, well spoke, well groomed, and focused on his objective of being sentenced to die...

(TR1 4:255-56). There was no finding that Robinson voluntarily, knowingly, and intelligently waived his right to a jury, let alone one supported by competent and substantial evidence. Robinson's jury waiver was an unreasonable finding of the facts. *See Brady v. United States*, 397 U.S. 742 (1970) (holding that an effective waiver of a constitutional right must be voluntary, knowing, and intelligent). It is clear from the colloquy that Robinson's waiver was not appropriate or constitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (TR1 1:32-33, 41-42).

The questioning of Robinson by the trial court regarding his rights was extremely truncated and inadequate. The brief questioning of Robinson by the trial court regarding his rights was focused solely on the guilty plea. (TR1 1:7, 11) (Court asking, "Do you know that the only options you have if you're convicted of first-degree murder, that you would be, if you plead, that you would only have the option of death or life in prison?"). The only questioning regarding any penalty phase rights at all was done by trial counsel and solely focused on what mitigating evidence could be presented during the penalty phase. (TR1 1:23-24). Neither trial counsel nor the trial

court touched on the rights Robinson was waiving by giving up a penalty phase jury.

The primary focus of the plea colloquy by the trial court and trial counsel was the waiver of rights associated with the guilt/innocence phase and the rights that accompany a jury trial. The trial court made no reference during the colloquy as to the rights Robinson was forfeiting by waiving a penalty phase jury. Trial counsel did make a passing reference to the aggravating and mitigating evidence which could be presented. However, there is no questioning specifically aimed at the penalty phase proceedings or the bare majority recommendation. This colloquy cannot be considered appropriate or unequivocal, and the trial court's fact-finding – or lack thereof – as to the penalty phase was reversed on appeal by this Court. *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). At the new penalty phase, no colloquy occurred at all regarding Robinson's right to a penalty phase jury, even though Robinson no longer wished to die and he allowed his attorneys to present new mitigating evidence.

Moreover, Robinson's colloquy immensely pales in comparison to Mullens' colloquy that consisted of "persistent questions" and a "thorough colloquy." *Mullens*, 197 So. 3d at 39 (Mullens remarked to the trial court that "it seem[s] like [the court] keep[s] asking the same thing like [he] is making the wrong decision or something." Mullens said he was "absolutely positive" as to his waiver). There were no questions by the trial court to Robinson regarding the specific rights that are abandoned by the waiver of jury sentencing at a penalty phase like those detailed in *Mullens* by this

Court in support of its denial. *See Id.*

Notwithstanding the insufficient colloquy, Robinson cannot waive a constitutional right that should have been afforded to him and every capital defendant, if the constitutional right did not exist at the time. The fact that Robinson's trial counsel stated that he believed that Robinson understood the possible consequences of his plea is not relevant as he advised him under the belief of an unconstitutional sentencing law. (TR1 1:7). *See Hurst v. Florida*, 136 S. Ct. 616; *see Ring v. Arizona*, 536 U.S. 884 (2002). Now that a unanimous jury is needed to sentence a defendant to death, the conversations and assessments between counsel and criminal defendants dramatically changes. Moreover, the colloquy by a court in cases of waivers will also dramatically change. *Hurst* will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; the jury will make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis, the landscape of voir dire and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments. As this Court explained in *Hurst v. State*, all of the

findings necessary for the imposition of a death sentence must be unanimously found by the jury:

*Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are “elements” that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding 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. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

202 So. 3d at 57-58; *See also, Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (remanding for a resentencing based on *Hurst v. State* where, although the jury was provided with an interrogatory verdict form, it did not unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances). Robinson never had the constitutional benefit of the option of a penalty phase jury to return a verdict making findings of fact. So we have no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they carried the immense and final responsibility for whether a death

sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all considerations for a conversation regarding a waiver and/or a colloquy. Reviewing courts cannot speculate as to what the findings or vote would be in a case where Robinson would be allowed a jury sentencing where twelve jurors have to make a binding decision.

Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join in a death recommendation at resentencing.

When this Court compares Mullens' colloquy to Robinson's, there is no comparison. The lower court erred in its findings and must be reversed. Robinson did not have an appropriate and unequivocal waiver of his jury sentencing during his first penalty phase and never waived his right to a jury during his second penalty phase. Robinson was predominantly questioned about the waiver of his guilt/innocence phase and the effect of a plea of guilt. Regardless, Robinson never waived his right to a jury at his new penalty phase after this Court vacated his death sentence, and his prior waiver should not have been binding at his new penalty phase proceeding. All of Robinson's rights were available anew and it was error to treat his waiver as binding in a completely new proceeding.

Moreover, Robinson's case represents why it is dangerous for this Court to create a blanket denial of *Hurst* review for waiver of jury sentencing cases. This Court must look at each case. Now, under *Hurst*, Robinson would get a life sentence if one juror voted for life versus the unconstitutional bare majority recommendation. Robinson's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, and *Hurst v. Florida*. The *Hurst* error in Robinson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Robinson's death sentence must be vacated and a resentencing ordered.

**Argument II: This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Robinson.**

This Court permitted all parties to include a brief statement to preserve arguments as to the merits of this Court's previously decided cases, as deemed necessary. Robinson will briefly address the additional arguments that were raised below and requests that this Court rely on his pleadings and arguments below in support of his request for *Hurst* review and relief. (R 121-46, 218-23).

The lower court, pursuant to this Court's precedence in *Asay* and *Mosley*, denied Robinson retroactive application of *Hurst*. (R 210-12). *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.<sup>2</sup> Retroactivity would also ensure that all defendants’ Sixth and Eighth Amendment rights are protected. “Considerations of fairness and uniformity make it very ‘difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.’” *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929). Accordingly, “[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications.” *Witt*, 387 So. 2d at 925. Partial retroactivity can never ensure fairness and uniformity in individual adjudications and would amount to arbitrary application of the death penalty. *See Asay*, 210 So. 3d at 37-41 (Perry, J. dissenting “The grave injustice of assigning whether a person lives or dies on a date in time, when it is clear that they were illegally sentenced is irreversible.”); *see Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Robinson’s death sentence

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<sup>2</sup> Robinson recognizes that *Asay v. State*, 210 So. 3d 1 (Fla. 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst*. However, Robinson’s case should be decided on an individual basis. To deny him the retroactive effect of *Hurst*, while granting it to similarly situated capital defendants, deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

was imposed without a unanimous jury verdict for death and without a valid waiver of that right. This Court held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”). The right to a unanimous jury recommendation of death requires full retroactivity and anything less results in an unreliable sentence which violates the Eighth Amendment.

Moreover, society’s evolving standards of decency demand that Robinson be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to now unanimous. Also, as a matter of due process and equal protection of laws under the Fourteenth Amendment, all death sentences under Florida’s unconstitutional sentencing scheme must be entitled to retroactive application of *Hurst*. See U.S. Const. amend. XIV. It can never be repeated enough that “Death is Different” and is permanent. Robinson must be granted retroactive relief of *Hurst v. Florida*. Robinson continues to preserve his arguments in his successive motion proceedings and his motion for rehearing for further appellate review.

Lastly, both *Hurst* decisions announced substantive rules that must be applied retroactively to Robinson by this Court under the Supremacy Clause. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the U.S. Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply “substantive”

constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State* – one under the Sixth Amendment and one under the Eighth Amendment.

In the *Hurst* context, the Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders “beyond the State’s power to punish,” *Welch v. U.S.*, 136 S. Ct. 1257, 1265 (2016), with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on” the judge-sentencing scheme. *Id.* And, in the context of a *Welch* analysis, the “unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment,” *Hurst*, 202 So. 3d at 60, *i.e.*, the new law by necessity places certain individuals beyond the state’s power to impose a death sentence.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the U.S. Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g., Ivan V.*

*v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). Because this Court is bound by the federal constitution, it has the obligation to address Robinson’s federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a “valid excuse”); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 340-42 (1816).

In light of fundamental fairness<sup>3</sup>, due process, equal protection, and the evolving standards of decency, partial retroactivity that sets a point in time as to whether a person lives or dies can never be constitutional. Robinson submits to this Court that in accordance with his Sixth, Eighth, and Fourteenth Amendment rights, he should receive retroactive application of *Hurst*. The *Hurst* error in Robinson’s case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Robinson’s death sentence must be vacated and a resentencing ordered.

### **CONCLUSION**

Robinson requests that this Court reverse the lower court’s rulings, vacate his sentence, and grant him a new penalty phase.

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<sup>3</sup> Like in *Mosley*, Robinson preserved a Sixth Amendment challenge and should be entitled to the retroactive effect of *Hurst* under *James v. State*, 615 So. 2d 668 (Fla. 1993).

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Doris Meacham, [Doris.Meacham@myfloridalegal.com](mailto:Doris.Meacham@myfloridalegal.com) & [cappapp@myfloridalegal.com](mailto:cappapp@myfloridalegal.com); on this 15<sup>th</sup> day of March, 2018.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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