

**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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**REPLY BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

The Appellant, Michael Lee Robinson (“Robinson”) relies on the arguments presented in the Initial Brief of the Appellant (“Initial Brief”), and offers the following reply to the Reply Brief of Appellee dated March 22, 2018. While Robinson will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues not specifically replied to herein.

Page references to 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.

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**ARGUMENT I: Robinson’s claims are not procedurally barred and he never waived his right to a penalty phase jury.**

**A. Robinson is not procedurally barred from obtaining review of his non-waiver of a penalty phase jury.**

Robinson has consistently asserted that he never waived his right to a penalty phase jury. Thus, contrary to the State’s assertions, he is not procedurally barred from obtaining relief.

This Court has not hesitated, in the past, to apply fundamental fairness to defendants who have properly preserved challenges before there were decisions enshrining those challenges as law. In fact, when this Court has declined to apply the rule of fundamental fairness as expounded in *James v. State*, 615 So.2d 668 (Fla. 1993), it has been as a result of failures to preserve the issue for appeal. See *Glock v. Moore*, 776 So.2d 243, 254-55 (Fla. 2001) (“In *James*, however, the defendant properly raised the issue in the trial court and again on appeal. *Glock*, on the other hand, failed to raise the issue on appeal.”). Applying fundamental fairness and retroactive effect to a defendant who has preserved the issue does not unnecessarily open the flood gates, but only grants relief to those, like Robinson, who have specifically preserved the issue. To do otherwise would not only engender an unfair and random result, but would be a violation of due process rights under the Fourteenth Amendment and the corresponding provisions of the Florida Constitution. “Due process requires that fundamental fairness be observed in each case for each defendant.” *Gore v. State*, 719 So.2d 1197, 1203 (Fla. 1998).

Further, it undercuts the importance of preservation of issues. “Preservation of the issue is perhaps the most basic tenet of appellate review, *see Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for capital defendants.” *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in result). “This preservation approach – enshrined in *James* – ameliorates some of the majority’s concern with the effect on the administration of justice.” *Id.*

Robinson raised Sixth Amendment challenges to his lack of a jury waiver, and this Court’s unconstitutional remanding of his new penalty phase before the judge alone. He raised these issues in his postconviction motion and his state petition for habeas corpus. Robinson has consistently challenged this Court’s denial of his Sixth Amendment right to a jury. In this case, the interests of finality must yield to fundamental fairness. It would be fundamentally unfair, and error, to ignore the Sixth Amendment infirmities in Robinson’s case.

The Appellee relies on this Court’s prior decision remanding Robinson’s case for a new penalty phase “before the judge alone,” *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1996), to find that Robinson is entitled to no relief. Reply Brief at 6. However, now, in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), we know that this Court’s prior decision was error. This Court’s opinion remanding Robinson’s case should not have placed any restrictions on Robinson’s ability, at his new penalty phase, to invoke his right, or waive his right, to a penalty phase jury. The right to have his new penalty phase 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). This Court violated that right when it remanded Robinson’s case “before the judge alone” and that violation cannot now be used to preclude him from relief.

**B. Robinson did not knowingly, intelligently, or voluntarily waive his right to a penalty phase jury.**

First, the Appellee is patently incorrect in asserting that Robinson ever made a valid *Durocher*<sup>1</sup> waiver. State’s Reply Brief at 4, 6, 8, and 10. At no point has Robinson ever asserted that he wished to waive his right to postconviction proceedings. In fact,

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<sup>1</sup> *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) (establishing that a defendant is entitled to waive postconviction proceedings so long as there is an inquiry conforming to *Faretta v. California*, 422 U.S. 806 (1975), into the “knowing, intelligent, and voluntary” nature of the waiver).

Robinson has asserted that right through filing a state postconviction motion, a state petition for habeas corpus, and through the federal court system. Nor was a *Durocher* proceeding ever initiated by the lower court. Since Robinson never made a valid *Durocher* waiver, this Court should disregard the entirety of Appellee's Argument I(B).

Appellee also argues that Robinson is not entitled to relief under *Hurst* because *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016) is controlling precedent. Appellee interprets its holding as "the defendant was entitled to no relief because he waived the penalty phase jury." Reply Brief at 7. However, that is an incomplete interpretation of *Mullens*, which also holds that, "a waiver of the right to jury sentencing will be upheld if that waiver is knowingly, voluntarily, and intelligently made" and that Mullens "*validly waived that right.*" *Id.* at 39, 40 (emphasis in original). The Appellee also mentions that *Mullens* quotes *Blakely v. Washington*, 542 U.S. 296, 310 (2004), but fails to include the portion of the quote that states, "If *appropriate* waivers are procured, States may continue to offer judicial factfinding." *Id.* at 38. Accordingly, as Robinson explained in his Initial Brief, this case is distinguishable from *Mullens* because, unlike Mullens, who validly waived his right to a penalty phase jury, Robinson never waived his right to a penalty phase jury during his second penalty phase.

The Appellee cites to multiple opinions where this Court has denied *Hurst* relief to a capital defendant who waived a penalty phase jury. Reply Brief at 7. However, all of the cases listed on page seven of the Reply Brief can be distinguished from Robinson's case

because all of those opinions cite *Mullens* as the precedent for denying relief. Again, Mullens was denied *Hurst* relief because his penalty phase jury waiver was valid. *Mullens*, 197 So. 3d at 40; *see, e.g., Wright v. State*, 213 So. 3d 881, 903 (Fla. 2016) (citing *Mullens* and declining to grant *Hurst* relief where the defendant had knowingly, voluntarily, and intelligently waived a penalty-phase jury). Nor is this Court’s recent *Silvia* decision persuasive because, as noted by this Court, “*Silvia* does not dispute in this case the validity of his original waiver.” *State v. Silvia*, -- So. 3d – 2018 WL 654715 \*1 (Fla. Feb. 1, 2018). The circumstances of Robinson’s case show that his waiver was invalid; therefore, none of the opinions denying *Hurst* relief on the basis of the holding in *Mullens* or *Silvia* are applicable to his case.

The Appellee’s argument that Robinson “was thoroughly informed in much the same manner as Mullins [sic]” is irrelevant as the trial court’s warnings only related to *guilt phase* rights – and only applies to Robinson’s first penalty phase. Reply Brief at 8-9. The quotes provided by the Appellee only demonstrate the inquiry covered as to the *guilt phase* rights Robinson was giving up by pleading guilty – at no point does the Appellee cite anything to even suggest that Robinson was fully informed of the *penalty phase* rights he was relinquishing. Further, no colloquy was ever performed during Robinson’s second penalty phase.

The Appellee further argues that a waiver remains valid regardless of later developments in the law. Reply Brief at 9. For this assertion, the Appellee is making the

same presumption as the lower court by assuming that Robinson's waiver was valid without further analysis. In addition, the cases cited by the Appellee solely relate to guilty pleas, which are distinguishable from waiving the right to a penalty phase jury because there is not a "high likelihood that defendants, advised by competent counsel, would falsely condemn themselves." See *Brady v. United States*, 397 U.S. 742, 758 (1970). Instead, what is at issue here is whether Robinson still wanted the death penalty or whether Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 so. 2d 269, 275 n.5 (Fla. 1999). The record is abundantly clear that Robinson never waived his right to a penalty phase jury during his second penalty phase, and he also allowed his trial counsel to present mitigating evidence and argue for a life sentence. The Supreme Court's concern about false guilty pleas is not at issue here, making *Brady* irrelevant to this Court's analysis of the issues.

Notably, the requirement that a valid plea must be knowing, intelligent, and voluntary still exists. *Brady*, 397 U.S. at 758 ("[O]ur view...is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions...."). Robinson has shown that he did not waive a second penalty phase jury and that his initial waiver was not knowing, intelligent, and voluntary. Therefore, Robinson's initial waiver is invalid, and he was not, and is not, bound by that waiver now.

Second, *McMann v. Richardson* explains that “[w]hether or not the advice the defendant received in the pre-*Jackson*<sup>2</sup> era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.” 397 U.S. 759, 773 (1970). There the Court was concerned with invalidating all New York guilty pleas motivated by confessions. *Id.* at 774. No such floodgates will swing open if Robinson is granted the benefits of *Hurst*.

Robinson has shown that his waiver was not knowing, intelligent, and voluntary. Therefore, Robinson’s initial waiver is invalid and he was not and is not bound by that waiver now – especially since he never waived his right to a penalty phase jury at his new penalty phase. Therefore, 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: Robinson’s death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.**

Appellee’s arguments against federal retroactivity are likewise not persuasive. *Hurst*

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<sup>2</sup> *Jackson v. Denno*, 378 U.S. 368 (1964).

retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the U.S. Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed based on a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Second, this argument does not address the equal protection concerns which flow from this Court holding *Hurst* partially retroactive. Until *Asay*, retroactivity has always been a binary decision – either a case is retroactive or it is not. In keeping with that precedent, in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court adopted the retroactivity analysis set forth in *Stoval v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965). The binary nature of the *Stoval/Linkletter* analysis is clear on the face of those opinions. *Stoval*, 388 U.S. at 294 ("This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the

exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively.”); *Linkletter*, 381 U.S. at 622 (“we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion.”). See *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) (“*the retroactivity or nonretroactivity* of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.”) (emphasis added); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 409 (1966) (“The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the problem of whether a judicial decision that overturns previously established law is to be given *retroactive or only prospective application.*”) (emphasis added).

This Court, by the separate results in *Asay* and *Mosley*, made *Hurst v. Florida* partially retroactive, without either decision deciding that partial retroactivity was permissible under *Witt v. State* or the *Stoval/Linkletter* analysis *Witt* was derived from. None of the parties to *Asay* and *Mosley*, advocated for partial retroactivity. No party argued that partial retroactivity was even a possible outcome since until *Asay* and *Mosley* case law had not recognized that partial retroactivity was even a possibility.

The ad hoc line drawing that resulted must of course be arbitrary, as ad hoc rulings are by definition, and do not comport with *Witt*. 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.”); *Id.* at 33 (Pariante, J., concurring in part, dissenting in part) (“a faithful application of the *Witt* test for retroactivity compels full retroactivity of *Hurst*.”); *Id.* at 37 (Perry, J., dissenting) (“I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a binary -- either something is retroactive, has effect on the past, or it is not.”); *Mosley*, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) (“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. I strongly dissent from this badly flawed decision.”). This arbitrary line drawing cannot comport with the Fourteenth Amendment.

### **CONCLUSION**

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

**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 27th 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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