IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-303

DANIEL OWEN CONAHAN, JR.

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Conahan's second successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

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

"PCR" record on prior 3.851 appeal to this Court;

"PCR2" – record on instant 3.851 appeal to this Court;

REQUEST FOR ORAL ARGUMENT

Mr. Conahan has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Conahan through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Twentieth Judicial Circuit, in and for Charlotte County, Florida entered the judgments of convictions and death sentences at issue. On February 25, 1997, Mr. Conahan was indicted on one count of first-degree premeditated murder, one count of felony first degree murder during the commission of or attempt to commit kidnapping, one count of kidnapping with intent to commit or facilitate the commission of sexual battery, and one count of sexual battery.

On August 9, 1999, Mr. Conahan waived his right to a jury trial for the determination of his guilt. The case went to trial before Twentieth Chief Circuit Judge William Blackwell on August 5, 1999.

In the midst of the guilt/innocence phase of the trial, on August 11, 1999, the State presented a *Williams* Rule proffer of evidence that included the testimony of Stanley Burden. Judge Blackwell admitted the *Williams* rule testimony before the defense presented its case. Although Judge Blackwell granted trial counsel's motion for judgment of acquittal on the sexual battery charge, the trial court found Mr. Conahan guilty on the three other counts.

The trial court then considered and granted trial counsel's motion for change of venue from Charlotte County to Collier County for purposes of the penalty phase, which, unlike the guilt innocence phase, was conducted before a jury on November 1-3, 1999 in Naples, Florida. The jury returned a unanimous recommendation of

death. The trial court conducted a *Spencer* hearing on November 5, 1999. At that hearing victim Montgomery's brother and mother read victim impact statements to the court. Mr. Conahan also testified and both parties subsequently provided sentencing memorandums to the trial court.

On December 10, 1999, the trial court sentenced Mr. Conahan to death on Count I, first-degree premeditated murder, and to fifteen years in prison for Count III, kidnapping. The State entered a *nolle prosequi* as to Count II, first degree felony murder. The trial court found three aggravating circumstances: (1) the murder was committed during the commission of a kidnapping; (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was heinous, atrocious, or cruel (HAC). The court failed to find the only statutory mitigation argued, that the victim was a participant in the defendant's conduct or consented to the act. The trial court did find four non-statutory mitigating circumstances under the catchall section 921.141(6)(h): (1) Mr. Conahan was a loving son who displayed loyalty, affection, and service to his parents; (2) he worked to improve himself by enrolling in nursing school; (3) he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family; (4) he is hard working. Mr. Conahan subsequently appealed the decision of the trial court to this Court. His initial brief raised five issues. The Court denied relief after oral argument. See *Conahan v. State*, 844 So. 2d 629 (Fla. 2003). A petition for certiorari to the United States Supreme Court was

denied on October 6, 2004. Mr Conahan filed his initial motion for postconviction relief in the circuit court on October 1, 2004. That motion was amended on July 17, 2009 and on October 21, 2009. A limited evidentiary hearing was held and the circuit court thereafter entered an order denying relief. After briefing and a state habeas corpus petition were filed, this Court again denied relief. *Conahan v. State*, 118 So. 3d 718 (Fla. 2013). There were six issues that were denied.[1]

On February 2, 2016 Mr. Conahan filed a successive motion for postconviction relief raising two claims: (1) newly discovered evidence that essential state witness Stanley Burden lied during his trial testimony, in violation of *Giglio* and *Brady*; (2) Mr. Conahan's death sentence is unconstitutional pursuant to *Hurst v. Florida*. (PCR2 1-28)

On April 1, 2016 the circuit court held a case management conference. (PCR2 871-972). Newly appointed Circuit Judge Donald Mason issued an order on May 5, 2016 summarily denying the newly discovered evidence claim and dismissing without prejudice the *Hurst* claim as premature because this Court had not ruled on

[1] (i) defense counsel did not render ineffective assistance during guilt phase; (ii) defendant failed to establish *Giglio* claim that state knowingly presented false testimony of victim's mother; (iii) defendant failed to establish *Brady* claim concerning audio recording of an undercover operation investigating him; (iv) defense counsel did not render ineffective assistance during penalty phase; (v) other crimes evidence in the form of defendant's prior, similar assault of another victim was admissible at trial; and (vi) appellate counsel did not render ineffective assistance on direct appeal.

the retroactivity of *Hurst*. (PCR2 387-392)

Mr. Conahan filed a motion for rehearing on May 18, 2016. (PCR2 393-401) That motion was denied on May 31, 2016. (PCR2 849-850). Mr. Conahan then filed a timely notice of appeal with this Court on June 29, 2016. (PCR2 851-861). This Court denied relief, commenting as follows:

> After full briefing this Court denied the successive 3.851 motion on February 17, 2017. As to Conahan's second claim under Hurst, the lower court denied it without prejudice as premature because this Court had not yet ruled on the retroactivity of Hurst. Here, both Conahan and the State request the Court not to address Hurst on appeal. Because Hurst is not raised, by agreement of the parties to address at a later time if appropriate, we do not address Hurst in this case without prejudice to the parties to raise a claim under Hurst in a different proceeding. It is so ordered.

Conahan v. State, 2017 WL 656306, at *2 (Fla., 2017). Rehearing on the Burden claim was subsequently denied on May 1, 2017.

Thereafter, on October 13, 2017, Mr. Conahan filed a second successive 3.851 motion seeking *Hurst* relief and the retroactive application of the substantive rights established by Chapter 2017-1. Following the case management conference on November 22, 2017, the circuit court denied relief on both claims on December 11, 2017, and Mr. Conahan appealed. This Initial Brief follows and is timely filed.[2]

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[2] Mr. Conahan currently has a pending federal habeas corpus petition in the United States District Court for the Middle District of Florida, Ft. Myers Division, Case No. 2:13-cv-428. A stay of proceedings has been entered in that case pending

ARGUMENT

Introduction: Due Process does not permit Mr. Conahan to be foreclosed by the decision rendered in *Hitchcock v. State*.

Pursuant to the briefing order issued by this Court, Mr. Conahan is herein exercising a substantive right to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. Pro. 9.140(b)(1)(D). Because he has been provided this substantive right, Mr. Conahan's right to appeal is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the … system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death

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the outcome of the proceedings now being exhausted in the state courts.

is the appropriate punishment' in any capital case."). The process by which the Court has directed Mr. Conahan to proceed in his appeal, indicates its intention on binding him to the outcome rendered in Hitchcock's appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another.

The fact that this Court has asked for a 25 page initial brief instead of a 20 page response to a show cause order (as it has done in numerous other cases), simply shows that this Court is employing the same truncated procedure. There is an evident prejudgment of the appeals and their scope. Mr. Conahan deserves an individualized appellate process, one that includes full briefing because *Hitchcock* did not raise the same issues at stake here.

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Mr. Conahan is being denied that opportunity by this Court's attempt to confine him to the outcome in *Hitchcock* without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution. Unlike the action taken in denying relief in *Hitchcock*, where this Court relied upon *Asay v. State* for the determination that *Hurst* was not retroactive to cases final before *Ring v. Arizona*. See *Hitchcock v. State*, 226 So. 3d 216, 217 (2017), it is clear that because Mr. Conahan's case became final well after June 24, 2002, *Hurst*

is retroactive to his case. *Hurst v. Florida* was a momentous shift in United States Supreme Court's jurisprudence. It recognized that Florida's capital sentencing scheme violated the Sixth Amendment where it did not require the jury to make the requisite findings of fact necessary to impose a sentence of death. *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) goes further still:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— *54 are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.[8] This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.' " *Ford v. State,* 802 So.2d 1121, 1134 (Fla.2001) (quoting *Campbell v. State*, 571 So.2d 415, 420 (Fla.1990), *receded from on other grounds by Trease v. State,* 768 So.2d 1050, 1055 (Fla.2000)). As we explain, we also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

Hurst v. State, at 53–54.

ARGUMENT I

MR. CONAHAN IS ENTITLED TO *HURST* RELIEF AND THE LOWER COURT'S SUMMARY DENIAL WAS IMPROPER.

In *Hurst v. State*, this Court addressed the old version of § 921.141 and identified the elements of the criminal offense, i.e. capital first-degree murder:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 53. Later in that opinion this Court went on to specifically hold that:

> [**A]ll 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. See *Brooks v. State*, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ...you are neither compelled

> nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. See *Henyard v. State*, 689 So.2d 239, 249 (Fla.1996) (quoting *Alvord v. State*, 322 So.2d 533, 540 (Fla.1975))(emphasis added).

Id. at 57-58.

Because the statutorily defined facts were necessary to increase the range of punishment to include death, this Court explained that proving them was necessary "**to essentially convict a defendant of capital murder**." *Id*. at 53-54 (emphasis added). Proof of these facts define a higher degree of murder. **Proof of these facts is necessary for a conviction**.

Hurst v. State carries implications under the Due Process Clause and the US Supreme Court's holding in *In re Winship*, 397 U.S. 358 (1970), that elements must be proven "beyond a reasonable doubt":

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). Claim I rests upon the State's obligation to prove each element of a criminal offense beyond a reasonable doubt as required by *In re Winship*.

Mr. Conahan was never convicted of capital first-degree murder because some of the elements of that offense, as defined by this Court in *Hurst v. State*, were not found by the jury to have been proven beyond a reasonable doubt. The jury wasn't instructed on these elements during the penalty phase and the judge made none of these findings at guilt phase. There was no interrogatory verdict at penalty phase indicating what the jury did and did not find beyond a reasonable doubt. We have no idea whether the jury in Mr. Conahan's case unanimously found beyond a reasonable doubt all the aggravators, that those aggravators are sufficient to impose death, or that those aggravators outweigh the mitigators. This is clear structural error under *Sullivan v. Louisiana*, 508 U.S. 275 (1993). As the U.S. Supreme Court in *Sullivan* explained:

> There being no jury verdict of guilty beyond a reasonable doubt, the question whether the *same* verdict of guilty beyond a reasonable doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless error scrutiny can operate.

Id. at 280.

Moreover, without a constitutional conviction of capital first-degree murder, any death sentence imposed is illegal because it is in excess of the statutory maximum for a conviction of first-degree murder.

Harmless error?

Hurst v. Florida applies retroactively to Mr. Conahan as a matter of state

retroactivity law. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). His case became final after June 24, 2002. Under *Danforth v. Minnesota*, 522 U.S. 264, 280-81 (2008), state courts may apply their own retroactivity rules so long as those rules provide at least the protections that are applicable under federal statutes. *See Danforth*, 552 U.S. at 266. As articulated above, the error in Mr. Conahan's case is structural and not subject to a harmless error review. However, given that in all other unanimous jury recommendation cases this Court has found that the *Hurst* violation was harmless beyond a reasonable doubt, there is no reason to expect that this Court will not affirm the lower court's denial of relief based on an application of the *per se* rule it has imposed in all other harmless error analyses in unanimous jury recommendation cases.

Beginning with *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), this Court has consistently held that *Hurst* errors are harmless in all cases where the advisory jury unanimously recommended the death penalty. The reasoning is that because advisory juries were instructed on the facts that a judge must find in order to impose a death sentences under Florida law; were told that their recommendation to the judge should be based on the same considerations; and unanimously recommended the death penalty, the same jury, or any other jury, certainly would have found the facts necessary for a death sentence under Florida law.

This reasoning ignores all case specific facts and the fact that pre-*Hurst* juries

were repeatedly admonished as to their "advisory" nature and made no findings in support of their final recommendation. In all the previous unanimous jury recommendation cases this Court has considered it found the *Hurst* error to be harmless, while it declined to make a finding of harmless error in any post-*Ring* case in which the jury was not unanimous. The operation of this Court's *per se* rule concerning harmless error effectively excuses the State of any obligation to establish that the *Hurst* error in Mr. Conahan's case was harmless.

A proper harmless-error inquiry in Mr. Conahan's case should focus on whether, in the context of the entire record, there is a reasonable chance of a different result if it had been the jury, rather than the judge, that had been empowered to conduct the fact-finding, including a review of mitigation, required for a death sentence. *See Chapman v. California*, 386 U.S. 18, 22-23 (1967).

As Mr. Conahan argued below in his Rule 3.851 motion:

> In Petitioner's case, the trial court found four non-statutory mitigating circumstances under the catchall section 921.141(6)(h): (1) Mr. Conahan was a loving son who displayed loyalty, affection, and service to his parents; (2) he worked to improve himself by enrolling in nursing school; (3) he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family; (4) he is hard working.[3] The trial court failed to find the only statutory factor argued before the jury.

[3]The trial court's written order is found at R. 3287-91.

> Given this mitigation, the State cannot show that there is no reasonable probability that at least some jurors in a constitutional proceeding, having been properly advised of their role as ultimate fact-finder in deciding whether to sentence Petitioner to death, would have decided that the death penalty should not be imposed.
>
> For those reasons, the jury's unanimous recommendation in Petitioner's case is insufficient to reliably conclude that the jury would have unanimously found all of the required elements satisfied in a constitutional proceeding.

PCR-2 (Instant Record on Appeal) at 36. Here, although Mr. Conahan's jury was accurately informed of its "advisory" role under Florida's unconstitutional pre-*Hurst* death penalty scheme, the jury was "affirmatively misled" as to its constitutional role in the death sentencing process. *See Caldwell v. Mississippi*, 472 U.S. 320 (1987).

ARGUMENT II

MR. CONAHAN IS ENTITLED TO APPLICATION OF CHAPTER 2017-1 AND THE LOWER COURT'S SUMMARY DENIAL WAS IMPROPER.

On March 13, 2017, Chapter 2017-1 became law. It revised Florida's capital sentencing statute, § 921.141, and **confirmed the construction of the statute in *Hurst v. State*.** As revised, it is now clear that under § 921.141 a defendant convicted of first-degree murder cannot receive a death sentence unless the State proves beyond a reasonable doubt additional elements necessary to convicted of the next higher degree of murder. To in essence convict of a defendant of capital first-degree

murder, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. *See* § 921.141(2)(b). Next, the jury must unanimously find that the aggravating factors that it unanimously found to exist are sufficient to justify a sentence of death. Then, the jury must unanimously find that "aggravating factors exist which outweigh the mitigating circumstances found to exist." *See* § 921.141(2)(b)(2). Finally, having made these unanimous findings, the jurors must then unanimously vote in favor of recommending a death sentence. Only if the jury unanimously finds that the State has proven these elements beyond a reasonable doubt, is the defendant guilty of capital first-degree murder and a judge is authorized under § 921.141 to impose a death sentence. It is clear that the legislature intended the revised § 921.141 to govern in any cases in which a death sentence is vacated and remanded for a new penalty phase. While the proceeding may carry the label "penalty phase," in actuality the proceeding will be to determine whether the defendant is guilty of capital first degree murder. The revised statute will govern in homicide cases committed well before its enactment. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017).

Implicated by the fact that the statute identified the elements of capital first degree murder is the Due Process Clause and *Fiore v. White*, 531 U.S. 225, 226 (2001). In *Fiore*, the U.S. Supreme Court noted:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a

> new interpretation of a state criminal statute retroactively to cases on collateral review.

But before resolving the issue, the Supreme Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted. Was the decision construing the criminal statute **a new interpretation** or was it **a straightforward reading of the statute**? *Fiore v. White*, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." *Id*. at 228. This meant that the ruling dated back to the statute's enactment. It was not a new interpretation of the statute, just a statement of the statute's plain meaning and so retroactivity was not at issue. *Id*. at 228 (because the Pennsylvania Supreme Court's statement of the statute's plain meaning "was not new law, this case presents no issue of retroactivity."). The statute's plain meaning dated to the day of its enactment.

In Fiore's case, this meant one element of the criminal offense had not been presented and found proven beyond a reasonable doubt by his jury. The U.S. Supreme Court held the Due Process Clause was violated and collateral relief was warranted:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that **the Due Process Clause of the Fourteenth Amendment forbids a State to convict a**

> **person of a crime without proving the elements of that crime beyond a reasonable doubt**.

Id. at 228-29. Because Fiore had not been found guilty of an essential element, his conviction was not constitutionally valid.

Just as occurred in *Fiore*, the Florida Supreme Court in *Hurst v. State* looked at the plain language in the statute and saw the statutorily necessary facts to convict of capital first degree murder were plainly stated:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these **findings necessary for the jury to essentially convict a defendant of capital murder** —thus allowing imposition of the death penalty—**are** also **elements** that must be found unanimously by the jury.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added). With the enactment of Chapter 2017-1, the decision in *Hurst v. State* was confirmed. Accordingly, these "elements" are now recognized as having always been there. The "elements" were there when the statute was enacted in 1972. In the *Scarpone* decision discussed in *Fiore*, the Pennsylvania Supreme Court used the plain meaning of the statute. Thus, the *Scarpone* decision had not established a new rule; it merely identified the substantive law set forth in the statute when it was enacted. This is what *Hurst v. State* did as confirmed by the enactment of Chapter 2017-1. The result must be the same as in *Fiore*. Without a jury finding each element of capital first degree murder proven beyond a reasonable doubt, post-conviction relief is required.

As *In re Winship* held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact necessary to constitute the crime** with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

CONCLUSION

Now in the post *Hurst* era in Florida, unless the jury returns a death recommendation by a unanimous vote, the revised statute sets the limit for the punishment of first-degree murder at life imprisonment. See § 921.141(3)(a)(1). As noted herein, although Mr. Conahan's jury did just that in the post-*Ring* time period it did so without the necessary **additional unanimous jury findings**, required by this Court and revised by Chapter 2017-1.

Specifically, before the jury can return a death recommendation, the statute requires the jury to: 1) identify each aggravating factor that it unanimously finds to exist, 2) unanimously find that sufficient aggravating factors exist to justify a death

sentence, 3) unanimously find that the aggravating factors outweigh the mitigating circumstances found to exist, and 4) unanimously find there is no basis for the imposition of a life sentence. *See* § 921.141(2)(b). Put simply, all relevant aspects of the jury's vote in Florida now must be unanimous before first-degree murder becomes punishable by death, i.e. capital first-degree murder. This did not happen in Mr. Conahan's case, even though, according to this Court's precedent, Chapter 2017-1's benefit currently embraces those, like Mr. Conahan, whose sentence was final on or after June 24, 2002. The failure of the jury in his case to be instructed on every element that needed to be found beyond a reasonable doubt was a violation of Mr. Conahan's Due Process rights. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993). A new sentencing hearing should be held.

Respectfully Submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been electronically filed through the Florida State Courts e-filing portal and thus served to: Timothy Freeland, *Timothy.Freeland@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com* on this 23rd day of April 2018.

The undersigned counsel further **CERTIFIES** that this **INITIAL BRIEF** was typed using Times New Roman 14 Point font.

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