**No. SC18-815**

IN THE

# Supreme Court of Florida

JOHN LOVEMAN REESE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

## APPELLANT'S INITIAL BRIEF

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## PRELIMINARY STATEMENT AND STANDARD OF REVIEW

This case is on appeal from the Circuit Court's summary denial of Appellant John Loveman Reese's July 7, 2017, successive motion for post-conviction relief under Rule 3.851, *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

This Court uses the *de novo* standard of review for questions of law. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

The written record on appeal from the original trial is cited as "ROA." The initial post-conviction record is cited as "PCR." The ROA from Mr. Reese's successive 3.851 proceedings is cited as "SPCR."

## REQUEST FOR ORAL ARGUMENT

Mr. Reese respectfully requests oral argument pursuant to Fla. R. App. P. 9.320, and also files a separate motion for oral argument with this brief.

## STATEMENT OF THE CASE AND FACTS

In 1993, Mr. Reese was convicted of first-degree murder in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County. ROA at 320. The record does not reflect whether the jury convicted Mr. Reese under the theory of premeditation or felony murder. A penalty phase was conducted pursuant to the Florida capital sentencing scheme in place at the time. *See Hurst v. Florida*, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme). The jury returned a

generalized verdict "advis[ing] and recommend[ing]" imposition of the death penalty by a vote of 8 to 4. ROA at 366; SPCR at 29. The jury did not make findings of fact or otherwise specify the factual basis for its recommendation.

The trial court, not the jury, then made the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1992), *invalidated by Hurst*, 136 S. Ct. at 624. The judge, not the jury, specifically found that three aggravating circumstances had been proven beyond a reasonable doubt during Mr. Reese's penalty phase.[1] ROA at 375-387; SPCR at 93-95; *Reese v. State*, 694 So. 2d at 680-81. The judge, not the jury, found beyond a reasonable doubt that the aggravating circumstances were sufficient to impose the death penalty, and that the aggravators were not outweighed by mitigation. ROA at 375-387; *see also* SPCR at 104-105. Based upon the judge's own fact-finding, the court sentenced Mr. Reese to death. *Id.*

This Court affirmed Mr. Reese's conviction on direct appeal in 1997, but found the trial court's sentencing order to be inadequate under *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990), because it did not "expressly evaluate, find, and weigh unrebutted mitigation". *Reese v. State*, 694 So. 2d 678, 684. (Fla. 1997). This

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[1] The aggravating circumstances found by the judge were: (1) the murder was cold, calculated, and premeditated; (2) the murder was heinous, atrocious, or cruel; and (3) the murder was committed in the course of a sexual battery and a burglary.

Court issued a limited remand, instructing the trial court to issue a new sentencing order. *Id.* at 685. In 1999, this Court again remanded the sentencing order. *Reese v. State*, 728 So. 2d 727, 728 (Fla. 1999). After the second remand, the trial court summarized its findings[2] and this Court affirmed the death sentence. *Reese v. State*, 768 So. 2d 1057 (Fla. 2000). Mr. Reese's sentence became final on March 5, 2001, when the United States Supreme Court denied his petition for writ of certiorari. *Reese v. Florida*, 121 S. Ct. 1239 (2001).

In 2002, Mr. Reese filed an initial motion in the state court for post-conviction relief. The trial court denied relief on these claims on June 27, 2007, including Mr. Reese's supplemented claims that Florida's capital sentencing scheme was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and that Mr. Reese's jury was improperly told that its role was advisory in violation of *Caldwell v. Mississippi*, 472 U.S. 220 (1985). PCR at 491-499, 651-658. This Court affirmed that denial on March 26, 2009. *Reese v. State*, 14 So. 3d 913 (Fla. 2009) (*rehearing denied*).

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[2] The court found no statutory mitigators and the following non-statutory mitigators: (1) good record in jail/adaptability to prison life (minimal weight); (2) childhood trauma (little weight); (3) positive character traits (minimal weight); (4) support of Jackie Grier (very little weight); (5) possessive relationship with Jackie Grier (very minimal weight); (6) emotional maturity (little weight); (7) drug and alcohol dependency (minimal weight); (8) no significant criminal history (no weight, or at most only very slight weight). SPCR at 96-104.

Mr. Reese filed a federal habeas petition on November 20, 2009. The United States District Court for the Northern District of Florida denied relief. *Reese v. Sec'y, Fla. Dep't of Corrs.*, No. 3:09-cv-1145, ECF No. 15 (Apr. 13, 2011). The United States Court of Appeals for the Eleventh Circuit affirmed. *Reese v. Sec'y, Fla. Dep't of Corrs.*, 675 F.3d 1277 (11th Cir. 2012), *cert. denied*, *Reese v. Tucker*, 568 U.S. 905 (2012).

In July 2017, Mr. Reese filed a successive motion for state post-conviction relief under *Hurst*. The state post-conviction court denied relief based on this Court's decision in *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), which held that *Hurst* applies retroactively on collateral review, but not to prisoners whose death sentences became final on direct appeal before *Ring* was decided on June 24, 2002. The court did not address Mr. Reese's argument that a *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. SPCR at 261-62.

## SUMMARY OF ARGUMENT

Mr. Reese was sentenced to death under Florida's prior unconstitutional sentencing scheme, in violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). His death sentence must be vacated. Additionally, Mr. Reese's successive 3.851 claim that new forensic brain-scanning technologies will reveal previously unknown evidence of organic brain damage was dismissed without prejudice, and is therefore not ripe for appeal before this court.

## ARGUMENT I

### I. Mr. Reese's death sentences violate *Hurst v. Florida* and *Hurst v. State*

Mr. Reese's death sentences violate *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Florida's unconstitutional scheme first required an advisory jury to render a generalized sentencing recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that before making its recommendation, the jury, not the judge, must make the findings of fact required to impose the death penalty under Florida law. *Id.*

In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires unanimous jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those

aggravators outweighed the mitigation. 202 So. 3d at 53-59.[3] This Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 343 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore 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."). The Court further cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven,

[3] As this Court correctly noted in *Hurst v. State*, "in interpreting the Florida Constitution and the rights afforded to persons within this State, this Court may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." 202 So. 3d at 57. This Court's unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death sentences may be imposed only upon unanimous jury verdicts.

were sufficient to impose death, and that they outweigh the mitigating circumstances.").

Mr. Reese's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, SPCR at 108, Mr. Reese's jury rendered only a unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, unanimously agreed that those aggravators outweighed the mitigation, or even unanimously determined the elements necessary for Mr. Reese's conviction under a particular theory of first-degree murder.[4]

Accordingly, Mr. Reese's death sentences violate the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

[4] Counsel for Mr. Reese requested the use of a special verdict form that would require the jury, if they found Mr. Reese guilty of first-degree murder, to specify whether they had found him guilty under the theory of premeditated murder or felony murder. ROA at 35-37. This proposed verdict form was denied. ROA at 317.

### A. *Hurst* should be applied retroactively to Mr. Reese's case

#### 1. Using *Ring* as a cutoff to determine retroactivity violates the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection

The Circuit Court's use of *Ring* as a cutoff to determine retroactivity violates the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. The Supreme Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined the Supreme Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel.*

*Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

Moreover, the United States Supreme Court has long understood the question of retroactivity to arise in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague v. Lane*, 489 U.S. 288, 304-07 (1989). The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g., Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016) ("In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. *See id.* at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford* to cases that were final when that case was decided . . . [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of the Supreme Court's precedents involve the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review. However, the *Ring* cutoff creates such a partial retroactivity scheme.

This *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence. The *Ring* cutoff divides prisoners into two classes based on the date their sentences became final relative to the June 24, 2002, decision in *Ring*, which was issued nearly 14 years before *Hurst*. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Id.* at 21-22. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Id.* at 1283.

As an initial matter, this Court described its rationale for the cutoff as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring*

recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional, and it was recognized as such in *Hurst*, not *Ring*. This approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of the United States Supreme Court upon which a new constitutional ruling builds.

The effect of the cutoff also does not meet its aim. This Court's rationale for drawing a retroactivity line at *Ring* is undercut by the court's denial of *Hurst* relief to prisoners whose sentences became final before *Ring* but who correctly but unsuccessfully challenged Florida's unconstitutional sentencing scheme after *Ring*,[5] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*. If prisoners whose sentences became final after *Ring* are deserving of *Hurst* relief because Florida's scheme has been unconstitutional since *Ring*, then prisoners who actually challenged Florida's scheme after *Ring* would also receive relief in a non-arbitrary scheme. Mr. Reese's case is in this category. *See Reese*, 768 So. 2d 1057. But, as it stands, he cannot access *Hurst* relief because he falls on the wrong side of the unconstitutional bright-line retroactivity cutoff.[6]

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[5] *See, e.g., Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

[6] In dissent in *Hitchcock v. State*, 226 So. 3d 216, 218-20 (Fla. 2017), Justice Lewis noted that this inconsistency should cause the court to abandon the bright-line *Ring*

The *Ring* cutoff also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk's transmitting the direct appeal record to this Court; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice took to draft the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; how long a certiorari petition remained pending in the Court; and so on.

In one striking example involving two inmates on Florida's death row, this Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari. Mr. Card's sentence became

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cutoff and grant *Hurst* relief to prisoners who preserved challenges to their unconstitutional sentences.

final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff. His *Hurst* claim was recently summarily denied by this Court. *Bowles v. State*, No. 235 So. 3d 292 (Fla. 2018).

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year

delay before the trial). Under the *Ring*-based approach, a defendant who was originally sentenced to death before Mr. Reese, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Mr. Reese does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment, as this Court has done, the question is "whether there is some ground of difference that rationally explains the different treatment . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. This Court's rule falls short of that demanding standard.

In contrast to the court's majority, several members of this Court have explained that the cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote:

"The majority's conclusion results in an unintended arbitrariness as to who receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Justice Perry was blunter: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification." *Id.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

Furthermore, the cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital

sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek and juries increasingly unlikely to impose death sentences.[7]

Florida prisoners who were sentenced to death before *Ring* are also more likely than post-*Ring* prisoners to have received those death sentences in trials that involved problematic fact-finding. The past two decades have witnessed broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was widely accepted in pre-*Ring* capital trials.[8] Forensic disciplines

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[7] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%. Further, the number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated July 2018), at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[8] *See, e.g.*, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (2016) (Report of the President's Counsel of Advisors on Science and Technology), *available at* https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/other_useful_information/forensic_information/pcast_forensic_science_report_final.pdf (evaluating and explaining the procedures of the various forensic science disciplines, including (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of

that were once considered sound fell under deep suspicion following numerous exonerations.[9]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. The American Bar Association ("ABA") guideline requiring a capital mitigation specialist for the defense was not even promulgated until 2003.[10] Limited information being provided to juries was

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complex-mixture samples, (3) bite-marks, (4) latent fingerprints, (5) firearms identification, (6) footwear analysis, and (7) hair analysis, and the varying degrees, or lack, of accuracy and reliability of these disciplines).

[9] *See, e.g.*, Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 166 (2007) ("The most recent study of 200 DNA exonerations found that forensic evidence (present in 57% of the cases) was the second leading type of evidence (after eyewitness identifications at 79%) used in wrongful conviction cases. Pre-DNA serology of blood and semen evidence was the most commonly used forensic technique (79 cases). Next came hair evidence (43 cases), soil comparison (5 cases), DNA tests (3 cases), bite mark evidence (3 cases), fingerprint evidence (2 cases), dog scent identification (2 cases), spectrographic voice evidence (1 case), shoe prints (1 case), and fiber comparison (1 case)."); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSICS SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 4 (2009), *available at* https://www.ncjrs.gov /pdffiles1/nij/grants/228091.pdf ("[Scientific advances] have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.").

[10] ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. Feb., 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31

especially endemic to Florida in the era before *Ring* was decided.[11] The capital defense bar in Florida, as a result of various funding crises and the inadequate screening mechanism for lawyers on the list of those available to be appointed in capital cases, produced what former Chief Justice of the Florida Supreme Court Gerald Kogan described as "some of the worst lawyering" he had ever seen.[12] As a

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HOFSTRA L. REV. 913, 952, 999-1000 (2003). *See also* Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases, Guideline 5.1(B), (C), 36 HOFSTRA L. REV. 677 (2008); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists,* 30 OKLA. CITY U. L. REV. 23 (2005); Mark Olive, Russell Stetler, *Using the Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 30 HOFSTRA L. REV. 1067 (2008).

[11] *See, e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id.* at iv-ix. The report also "caution[s] that their harms are cumulative." *Id.* at iii.

[12] Death Penalty Information Center, *New Voices: Former FL Supreme Court Judge Says Capital Punishment System is Broken, available at https://deathpenaltyinfo.org/new-voices-former-fl-supreme-court-judge-says-capital-punishment-system-broken* (citing G. Kogan, *Florida's Justice System Fails on Many Fronts*, St. Petersburg Times, July 1, 2008).

result, since 1976, Florida has had 27 exonerations—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[13] And as for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[14]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[15] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[16] In fact, relying on the cutoff, this Court

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[13] Death Penalty Information Center, *Florida Fact Sheet, available at* https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=8&race=All&dna=All.

[14] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

[15] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.").

[16] *See* ABA Florida Report at vii ("Between 1972 and 1979, 166 of the 857 first time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment without the possibility of parole . . . . Not only does judicial override open up an additional window of opportunity for bias—as

has summarily denied *Hurst* relief where the defendant was sentenced to death by a judge "overriding" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Moreover, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987), as occurred in Mr. Reese's case. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

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stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

Finally, prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g.*, *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari).

Taken together, these considerations show that this Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

### 2. *Hurst* should be applied retroactively to Mr. Reese's case under the Supremacy Clause of the United States Constitution

The federal Constitution protects Mr. Reese's right to *Hurst* retroactivity. Federal law requires *Hurst* to be applied retroactively even by state courts applying state retroactivity doctrines. Mr. Reese's federal right to *Hurst* retroactivity does not turn on the date his sentence became final relative to the date *Ring* was decided. Federal law does not countenance the concept of "partial retroactivity," under which

a new constitutional rule is applied to some cases on collateral review but not to others.

Mr. Reese's federal right to *Hurst* retroactivity is highlighted by the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See id.* at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery*, the Appellant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles unconstitutional). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under state retroactivity law. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that, under the United States Constitution, may not be denied to Florida defendants on state retroactivity grounds.

In fact, in *Hurst v. State*, this Court announced two substantive rules. First, this Court ruled in *Hurst v. State* that the Sixth Amendment requires that juries decide, *beyond a reasonable doubt*, whether each of the elements of a death sentence have been satisfied—certain aggravating factors have been proven, the aggravators are sufficient to impose the death penalty, and the aggravators outweigh the mitigation. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). The Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, this Court held in *Hurst v. State* that the Eighth Amendment requires the jury's finding of the elements during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As this Court made clear,

the function of the unanimity-of-fact-finding rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at 47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions, *see Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to Mr. Reese.

### B. The *Hurst* error is not harmless

#### 1. The *Hurst* error in Mr. Reese's case was not harmless in light of the non-unanimous jury recommendation

Because Mr. Reese's death sentence violates *Hurst v. Florida* and *Hurst v. State*, Mr. Reese should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was "harmless beyond a reasonable doubt." The Supreme Court's precedent is clear that harmless-error analysis must include a fact-specific review of the whole record. *See, e.g., United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose v. Clark*, 478 U.S. 570, 583 (1986) ("We have held

that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless."); *see also Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt").

In *Hurst*, this Court stated that "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence." *Hurst v. State*, 202 So. 3d at 68. The "State bears an extremely heavy burden" in this context, as, in other words, they must show there is "no reasonable probability that the error contributed to the sentence." *Id.* This Court has noted that the State's ability to meet their burden in the *Hurst* context is "rare." *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

The *Hurst* error in Mr. Reese's case was not harmless beyond a reasonable doubt because his advisory jury recommended the death penalty by a non-unanimous vote of 8-4. This Court's precedent establishes that where, as here, the advisory jury's vote was not unanimous, the State cannot establish that the *Hurst* error was harmless beyond a reasonable doubt. In *Dubose v. State*, the Court made it clear

that, "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of the applicable aggravating and mitigating circumstances. 210 So. 3d 641, 657 (Fla. 2017).

The Court has *never* found a *Hurst* error harmless in a case, like Mr. Reese's, where the jury vote was not unanimous. The Court has now addressed harmless error and granted relief in over a dozen non-unanimous-recommendation cases that are materially indistinguishable from Mr. Reese's. *See Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (11-1 jury vote); *Durousseau v. State*, 218 So. 3d 405, 415 (Fla. 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (10-2 jury vote); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2016) (9-3 jury vote); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2016) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4 jury vote); *Mosley v. State*, 209 So. 3d 1248, 1284 (Fla. 2016) (8-4 jury vote); *Dubose v. State*, 210 So. 3d 641, 657 (2017) (8-4 jury vote); *Anderson v. State*, 220 So. 3d 1133, 1150 (Fla. 2017) (8-4 jury vote); *Calloway v.* State, 210 So. 3d 1160, 1200 (Fla. 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote); *see also Brooks v. Jones,* 2017 WL 944235 at *1 (Fla., March 10, 2017) (9-3 and 11-1 jury votes). The same harmless error result should occur in Mr. Reese's case.

The *Dubose* holding that *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of this Court's analysis in *Hurst v. State*. Under *Hurst v. State*, this Court emphasized that Florida's courts may not speculate that, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. As this Court cautioned, engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So. 3d at 69; *see also Mosley*, 209 So. 3d 1248, at 1283-84. The reasoning the Court applied in *Hurst v. State* applies in Petitioner's case.

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68.

Even if precedent allowed courts to find *Hurst* errors harmless in cases with non-unanimous jury recommendations, the State still could not show that the *Hurst* error in Mr. Reese's case was harmless beyond a reasonable doubt. First, there is no reason to believe that the one juror who voted to recommend a life sentence would have made the fact-finding required to impose the death penalty in a hypothetical constitutional proceeding. On the contrary, it is more likely that *fewer* jurors would

have made the required fact-finding than voted for an advisory recommendation to impose the death penalty. That is because the jury's consideration of the evidence would have been different in a way beneficial to Mr. Reese if the jury had been required to conduct the fact-finding instead of making a general sentencing recommendation. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing significant negative impact of a jury's belief that ultimate responsibility for determining whether defendant will be sentenced to death lies elsewhere). In order to further reliability in capital sentencing, the United States Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotes omitted). Under Florida's prior unconstitutional scheme, the jurors did not provide a recommendation with an understanding of their personal responsibility.

Second, in a hypothetical constitutional system, the jury's fact-finding would have been significantly impacted by the mitigation presented at the penalty phase. In *Hurst v. State*, this Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("[W]e cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence."). Mr. Reese's history is rife with mitigating evidence, including the horrific death of his adoptive

mother at the hands of his adoptive father while the young Mr. Reese was in the house, unstable family relationships from that point in his life forward, a persistent adulthood battle with substance abuse, and a lack of significant criminal history. It cannot be convincingly demonstrated that jurors would find otherwise.

Third, if Mr. Reese's counsel's thinking had not been influenced by the statutory framework struck down by *Hurst*, Petitioner and counsel could certainly have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. As such, it cannot be concluded that a jury unanimously would find any specific aggravators and reject mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote).

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that, among the aggravators applied to Mr. Reese, were those based on a contemporaneous felony conviction, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., McGirth*, 209 So. 3d 1146, 1164 (Fla. 2017) (contemporaneous felony); *Mosley*, 209 So. 3d at 1284 (contemporaneous felony); *Williams v. State*, 209 So. 3d 543, 567

(Fla. 2017) (prior contemporaneous felon). Notably, this Court found the *Hurst* error *not* harmless in *Mosley* despite the fact that the judge in that case had found a contemporaneous felony aggravator. *Mosley*, 209 So. 3d at 1284. The same reasoning should apply in Mr. Reese's case.

For the foregoing reasons, this Court should apply to Mr. Reese's case its uniform approach of ruling *Hurst* errors not harmless based on the jury's non-unanimous recommendation.[17]

### 2. Retroactive application of *Hurst* is especially important where jury decisions were infected with *Caldwell* error, as in Mr. Reese's case

In *Caldwell v. Mississippi*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. 472 U.S. at 328-29. The United States Supreme Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be

[17] If this Court for some reason diverges from its precedent establishing that all *Hurst* errors in non-unanimous-recommendation cases are not harmless, any doubts as to whether the *Hurst* error in Mr. Reese's case was harmless should be resolved only after a remand for an evidentiary proceeding, at which counsel can develop evidence regarding the impact of the error, particularly as it relates to the effect on defense counsel's strategy, challenges to the aggravation, and presentation of mitigation.

ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29.

Here, the jurors in Mr. Reese's case were repeatedly told by the trial court that their recommendation was advisory and that the final sentencing decision rested solely with the judge.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors told relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make

a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

*Caldwell* errors must be assessed in light of the entire record. *See, e.g., Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). However, the Circuit Court did not conduct an analysis of the entire record in Mr. Reese's case. It did not consider Mr. Reese's brain damage and the compelling mitigation evidence that had been presented during the penalty phase and how the jury's reduced sense of responsibility in the sentencing determination affected the jury's assessment of this mitigation evidence. The failure of this Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Appellant's, is inconsistent not only with the United States Supreme Court's harmless-error precedents, but also with the Eighth Amendment.

## ARGUMENT II

### I. This Court should remand Mr. Reese's brain damage claim

Mr. Reese's successive 3.851 next raised a claim that new forensic brain scanning technologies will reveal additional mental health mitigation – specifically previously unknown evidence of organic brain damage, brain defects, and cognitive impediments that were unknown and undetectable at the time of Mr. Reese's trial. The circuit court dismissed this claim without prejudice as "premature" and "not legally sufficient", stating that "[in] its current form, the claim of newly discovered evidence is too speculative in nature to warrant relief." SPCR at 263-265.

As noted, the dismissal is without prejudice. The circuit court ruled that defendant should refile once defense counsel obtained further information. SPCR at 314 ("[I]f you don't have the information yet, I don't see that there is any prejudice to either withdrawing the motion now or I can just deny it and you can refile it if and when you have something to support it"); *see also id.* at 317 ("If you've got something from Dr. Crown or some other doctor in the future I don't see you're prohibited from filing it"). The circuit court's ruling is in accord with the constitutional right to "access a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017) (citing *Ake v. Oklahoma*, 470 U.S. 68, 80, 83 (1985).

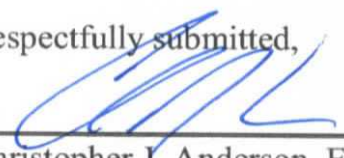
Undersigned counsel was appointed by the circuit court in this case. The undersigned has sought out the assistance of the Capital Habeas Unit (CHU), Federal Public Defender for the Northern District of Florida. Counsel will continue to seek the CHU's assistance in order to provide adequate representation, including with regard to this claim.

Accordingly, the claim is not ripe at this juncture and, as the circuit court ruled, will be addressed at a later, more appropriate, time. Any appeal of the claim regarding Mr. Reese's brain damage is therefore unripe before this Court, and this Court should not address it at this time.

## CONCLUSION

For the foregoing reasons, Mr. Reese respectfully requests that, in light of the record below, this Court find that Mr. Reese's death sentences violate *Hurst v. Florida* and *Hurst v. State* and accordingly vacate the death sentences imposed in this case.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2018 the foregoing was served via the e-portal to Assistant Attorney General Jennifer Donahue, counsel for the State, at jennifer.donahue@myfloridalegal.com and capapp@myfloridalegal.com.

Christopher J. Anderson

## CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated initial brief is in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

Christopher J. Anderson