IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT JOE LONG
DEFENDANT/APPELLANT

CASE NO. **84-CF-013346-A**

VS.

STATE OF FLORIDA
PLAINTIFF/APPELLEE

APPELLATE CASE NO: SC19-726

APPEAL FROM THE CIRCUIT COURT, CRIMINAL DIVISION, OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

THE HONORABLE MICHELLE SISCO
JUDGE OF CIRCUIT COURT
CRIMINAL DIVISION

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EVIDENCE DATA SHEET – CRIMINAL COURTS No. 191192

STATE OF FLORIDA

Vs.

ROBERT JOE LONG

D.O.B.: 10/14/1953

Case No: 84-CF-013346-A **Trial Division 1**

Judge: Michelle Sisco

Date: 5/1/2019

Court Type: STATUS REVIEW

Arresting Agency: Hillsborough County Sheriff's Office

Arresting Agency Number: 84104684

Court Clerk: VALERIA ANDERSON

LIST OF PLAINTIFF/DEFENDANT EXHIBITS

EXHIBITS NO	DESCRIPTIONS OF EXHIBITS	ADMITTED	LOCATION
D-1 ✓	DUANE EUGENE OWENS –SUCCESSIVE MOT TO VACATE JUDGMENT OF CONVICTION AND SENTENCE	5-1-19	27-8-1
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Evidence Clerk _____ **Court Clerk** Valeria Anderson **Date** 5-7-19

Exhibits Released in Court to: Sign _____ **Print** _____

Agency _____ **Date** _____

EXHIBIT NO. 1

STATE ____ DEFENSE X COURT ____

CASE NUMBER(S) 84-CF-13346

DEFENDANT(S) Bobby Joe Long

FILED FOR IDENTIFICATION 5-1-19
(DATE)

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(DATE)

CIRCUIT COURT
HILLSBOROUGH COUNTY
PAT FRANK, CLERK

BY Valerie Anderson Deputy Clerk

Filing # 50878270 E-Filed 01/06/2017 03:14:56 PM

**IN THE CIRCUIT COURT OF THE FIFTEENTH CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA**

STATE OF FLORIDA
Plaintiff,

v. **CASE NUMBER:** 84-4014

DUANE EUGENE OWEN
Defendant.
_____/

**SUCCESSIVE MOTION TO VACATE
JUDGMENT OF CONVICTION AND SENTENCE**

Comes now Duane Eugene Owen, the Defendant in the above-captioned action, and respectfully moves this Court for an Order, pursuant to Florida Rule of Criminal Procedure 3.850 and Florida Rule of Criminal Procedure 3.851, vacating and setting aside his death sentence. Mr. Owen states the following:

(A) JUDGMENT AND SENTENCE UNDER ATTACK

Mr. Owen was charged by indictment with first-degree murder, sexual battery and burglary. After a jury trial, Mr. Owen was convicted of first-degree murder, attempted sexual battery and burglary and sentenced to death. The Supreme Court of Florida reversed and Mr. Owen received a new trial. Mr. Owen was convicted of first-degree murder, attempted sexual battery with a deadly weapon or force likely to cause serious personal injury and burglary of a dwelling while armed. After a penalty phase advisory panel non-unanimously recommended a death sentence. After a *Spencer* hearing the Circuit Court imposed a death sentence. In support of the death sentence the Court found four aggravating factors:

> (1) the defendant had been previously convicted of another capital offense or a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to

> commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification (CCP).

Owen v. State, 862 So.2d 687, 690(Fla. 2003).

The Court found three statutory mitigating factors:

> (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three.
> *Id.* at 691.

The Court also found sixteen non-statutory mitigating factors:

> (1) the defendant was raised by alcoholic parents; (2) the defendant was raised in an environment of sexual and physical violence; (3) the defendant was a victim of physical and sexual violence ; (4) the defendant was abandoned by the deaths of his parents and abandoned by other family members; (5) the defendant has a mental disturbance and his ability to conform his conduct to the requirements of law was impaired; (6) the defendant was cooperative in court and not disruptive during court proceedings; (7) the defendant has made a good adjustment to incarceration and will be a good prisoner; (8) the offense for which the defendant was to be sentenced happened fifteen years ago; (9) the defendant will never be released from prison if given life sentences without parole; (10) the defendant cooperated with law enforcement; (11) the defendant obtained a high school equivalency diploma; (12) the defendant received a general discharge under honorable conditions from the United States Army; (13) the defendant saved a life in his youth; (14) the defendant suffered from organic brain damage; (15) the defendant lived in an abusive orphanage; and (16) any other circumstances of the offense. As to this final nonstatutory mitigating factor, the trial court considered the fact that Mr. Owen did not harm the two young children that [redacted] was babysitting at the time of her murder, nor did he harm [redacted] two young children who were present in her home at the time of her murder.

Id.

Mr. Owen appealed his conviction and death sentence to the Supreme Court of Florida, which affirmed the same. *Owen v. State*, 862 So.2d 687, 690(Fla. 2003). Mr. Owen then sought a Petition for Writ of Certiorari to the Supreme Court of Florida, which the United States Supreme Court denied. *Owen v. Florida*, 543 U.S. 986, 125 S. Ct. 494 (2004).

(B) PREVIOUS CLAIMS AND DISPOSITION IN STATE COURT

Direct Appeal

On direct appeal, Mr. Owen raised seven issues: (1) the trial court erred in failing to suppress his confession on the basis of voluntariness; (2) the trial court erred in failing to suppress his confession because Mr. Owen made an unequivocal invocation of his right to remain silent which was ignored by the law enforcement officers questioning him; (3) the trial court improperly applied the aggravating factor of heinous, atrocious, or cruel (HAC); (4) the trial court improperly applied the aggravating factor of cold, calculated, and premeditated (CCP); (5) the sentence of death is disproportionate; (6) Florida's death penalty statute is unconstitutional; and (7) the aggravating factor of murder in the course of a specified felony is unconstitutional. *Owen* at 693. The Supreme Court of Florida affirmed the conviction and sentence of death. *Id.*

Prior postconviction motion

CLAIM I: Mr. Owen was denied the effective assistance of counsel during the pre-trial phase which violated Mr. Owen's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM II: Mr. Owen was denied the effective assistance of counsel during jury selection which violated Mr. Owen's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

Claim III: Mr. Owen was denied the effective assistance of counsel during the guilt phase which violated Mr. Owen's rights Under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM IV: Mr. Owen was denied the effective assistance of counsel during the penalty phase which violated Mr. Owen's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments To the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM V: State agencies claimed exemptions to Florida's public records law in bad faith which denied Mr. Owen his rights to due process, habeas corpus, a fair state postconviction process and ultimately the ability to test the reliability of his conviction and death sentence thus violating Mr. Owen's rights under the Fourth, Fifth, Sixth, Eighth And Fourteenth Amendments and the Habeas Clause of the United States Constitution and the corresponding provisions of the Florida Constitution.

The postconviction court denied relief and Mr. Owen appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the postconviction court and denied Mr. Owen's state petition for writ of habeas corpus. *Owen v. State*, 986 So. 2d 534, 541 (Fla. 2008), as revised on denial of reh'g (July 10, 2008). Mr. Owen filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court. The District Court denied relief. Mr. Owen appealed to the United States Court of Appeals for the Eleven Circuit, which affirmed the District Court. *Owen v. Florida Dep't of Corr.*, 686 F.3d 1181 (11th Cir. 2012). Mr. Owen petitioned for certiorari in the United States Supreme Court, which denied the petition. *Owen v. Crews*, 133 S. Ct. 2049, 185 L. Ed. 2d 889 (2013).

(C) NATURE OF RELIEF SOUGHT

1. Mr. Owen respectfully requests that he be granted leave to amend as necessary.
2. Mr. Owen requests that this Court vacate his death sentence.
3. Any other relief that this Court may find appropriate.

(D) CLAIMS NOT REQUIRING AN EVIDENTIARY HEARING UNLESS NECESSARY

The claim and sub-claims that follow come before this Court with a complete trial record and a complete postconviction record. Both records are more than sufficient for this Court to render a decision that is right and follows the United States Constitution and Florida Constitution. Nevertheless, depending how the Florida Supreme Court rules an evidentiary hearing may become necessary.

CLAIMS

IN LIGHT OF *HURST*, *RING*, AND *APPRENDI*, MR. OWEN'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 15 AND 16 OF THE FLORIDA CONSTITUTION.

Hurst v. Florida, 136 S. Ct. 616 (2016) is a landmark decision issued by the United States Supreme Court that declared Florida's death penalty system unconstitutional. Based on *Hurst,*

other case law, and the implications arising therefrom, Mr. Owen's death sentence violates the United States Constitution and the Florida Constitution. This Court should vacate Mr. Owen's death sentence.

1. Mr. Owen's Death Sentence Should Be Vacated Because It Is Unconstitutional Based On *Hurst*, Prior Precedent And Subsequent Developments Because Mr. Owen Was Denied His Right To A Jury Trial On The Facts That Led To His Death Sentence.

The United States Supreme Court issued *Apprendi* and *Ring*. In *Apprendi*, the Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The Court recognized that the principles supporting a jury trial,

> extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477, 2356 (citations omitted). Justice Scalia, in concurrence, added,

> It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly bureaucratic part of it, at that.). The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. 498, 2367.

In *Ring v. Arizona*, 536 U.S. 584,122 S.Ct. 2428 (2002), the Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589, 2432. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court stated the crux of *Ring*, that

> "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's judge not engaged in any factfinding, *Ring* would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.'"

Hurst, 136 S.Ct. at 621. (Internal quotes omitted). The Court applied *Ring* directly to Florida's death penalty system and found:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. at 621-22.

The findings of fact statutorily required to render a defendant death-eligible are elements of the offense that separate first-degree murder from capital murder under Florida law, and form part of the definition of the crime of capital murder. Mr. Owen's death sentence was obtained under the exact death penalty scheme found unconstitutional in *Hurst*. Mr. Owen's death sentence, imposed without the proper jury fact-finding, violates the Sixth Amendment under *Ring* and *Hurst*.

Mr. Owen raised the issue of the unconstitutionality of Florida's death penalty scheme on direct appeal. Mr. Owen's death sentence was imposed contrary to *Ring*. Mr. Owen's direct appeal arguments, however, did not have the clear statement to and specific application to Florida of *Hurst*

when he raised the unconstitutionality of his death sentence.

Without regard to any issues of retroactivity possible or application of harmless error, Mr. Owen asserts, without equivocation that he was denied his right to a jury trial on the essential elements that led to his death sentence in violation of the United States Constitution and the corresponding provisions of the Florida Constitution. Because the State denied Mr. Owen a jury trial on the essential elements necessary for a death sentence, this Court should vacate Mr. Owen's death sentence.

2. This Court Should Vacate Mr. Owen's Death Sentence Because, In Light Of *Hurst* And Subsequent Cases, Mr. Owen's Death Sentence Violates The Eighth Amendment Because His Death Sentence Was Contrary To Evolving Standards Of Decency And Is Arbitrary And Capricious.

"Death is different." *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976). The United States Supreme Court has made clear:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [ ] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Thompson v. Oklahoma, 487 U.S. 815, 856, 108 S. Ct. 2687, 2710, (1988)(internal citations omitted).

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id.* at 239–40, 2727. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *et al. Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because

of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. at 188, 96 S. Ct. at 2932.

The Supreme Court has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, 2929, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved. *Id.* citing *Furman v. Georgia*, 408 U.S., at 439-440, 92 S.Ct., at 2828-2829 (Powell, J., dissenting). Mr. Owen had no jury and thus death sentence had none of the Eighth Amendment reliability of a jury verdict.

A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct 1821 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586, 605; 98 S. Ct. 2954, 2964-65(1978) explained:

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605; 2954 (Emphasis and footnotes omitted).

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* at 189, 2932. In *Gregg*, the Court upheld Georgia's death penalty scheme and found,

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.

Id. at 206, 2940–41. Mr. Owen, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentence in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Mr. Owen's case, the advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633(1985). In *Caldwell*, the Supreme Court stated and held that it:

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341, 2646. Any reliance or argument based on the advisory recommendation in Mr. Owen's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell*. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

The Supreme Court has also limited the death penalty under the Eighth Amendment based on evolving standards of decency.

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam); Robinson v. California,* 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758

> (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in *Atkins,* the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " 536 U.S., at 311, 122 S.Ct. 2242 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles,* 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560–61, 125 S. Ct. 1183, 1190 (2005). Florida has been an outlier, for a very long time. The United States Supreme Court and the Florida Supreme Court's decision on remand show that standards of decency have evolved to require that a jury find all of the facts necessary to sentence Mr. Owen to death beyond a reasonable doubt.

On remand in *Hurst v. State*, the Florida Supreme Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. The Florida Supreme Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact- finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry

> contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The Court cited to Eighth Amendment concerns finding 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." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id.* at 59.

The Florida Supreme Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted)." *Hurst v. State,* at 60.

Mr. Owen was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell*. A mere recommendation of 10-2 would be inadequate under the *Hurst v. State* and *Perry v. State.* To subject Mr. Owen to the death penalty based on Florida's previous

unconstitutional system when a non-unanimous jury advisory recommendation would today violate the United States and/or the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. Owen is ensconced in a class of individuals who may not be subject to the death penalty. Mr. Owen was sentenced to death without the reliability of jury fact finding and unanimity. His death sentence violates the Eighth and Fourteenth Amendments. This Court should vacate his death sentence.

3. This Court Should Vacate Mr. Owen's Death Sentence Because The Fact-Finding That Subjected Mr. Owen To The Death Was Not Proven Beyond A Reasonable Doubt.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold 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, 90 S. Ct. 1068, 1073 (1970).

In *Ivan V. v. City of New York*, the Supreme Court applied Winship's proof-beyond-a-reasonable doubt standard retroactively, stating,

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams v. United States,* 401 U.S. 646, 653,

> 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). See *Adams v. Illinois*, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); *Roberts v. Russell*, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968).
>
> Winship expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S.Ct., at 1072.
>
> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and Winship is thus to be given complete retroactive effect.

Ivan V. v. City of N.Y., 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952, (1972). In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), the Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. *Id.* at 704, 1892. Thus, under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion. Again, this right was so fundamental that the United States Supreme Court found no issue with retroactive application in *Hankerson v. N. Carolina*, 432 U.S. 233, 240–41, 97 S. Ct. 2339, 2344, (1977).

The jury trial of *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Mr. Owen was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. The Florida Supreme Court also made it abundantly clear that Mr. Owen has the right to proof beyond a reasonable doubt. This Court should vacate his death sentence.

4. In Light Of *Hurst*, Mr. Owen's Death Sentence Should Be Vacated Because It Was Obtained In Violation Of The Florida Constitution.

On remand, the Florida Supreme Court applied the Supreme Court's decision in *Hurst* in light of the Florida Constitution and held:

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So.3d at 44. In *Perry v. State*, --So.3d - - 2016 WL 6036982 (Fla. 2016). The Florida Supreme Court found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional and found:

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in Hurst. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.4 Hurst, SC12–1947, —— So.3d at ——, slip op. at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. Id. at ——— – ———, ——, at 23–24, 36.

Perry v. State, No. SC16-547, 2016 WL 6036982, at *1 (Fla. Oct. 14, 2016)

Thus, the new statute was unconstitutional. The increase in penalty imposed on Mr. Owen was without any jury at all. No unanimous jury found "all aggravating factors to be considered,"

"sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." *Id.* Lastly, there was no "unanimity in the final jury recommendation for death." *Id.*

Moreover, Mr. Owen has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Owen's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . .

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Owen under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Owen. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Owen was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Owen was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not

found by the Grand Jury and contained in the indictment.

This Court should vacate Mr. Owen's death sentence because his death sentence was obtained in violation of the Florida Constitution.

5. The Court's Denial Of Mr. Owen's Postconviction Claims Must Be Reheard And Determined Under A Constitutional Framework.

Mr. Owen raised claims in his postconviction motion that were adjudicated under an unconstitutional system. In applying the law to the facts raised in Mr. Owen's postconviction motion, this Court determined Mr. Owen's ineffective assistance of counsel claims, and other claims, based on the constitutionally incorrect analysis that it was the judge that was required to, and did, make the findings of fact. In light of *Hurst*, Mr. Owen incorporates his previously filed initial and amended postconviction motions filed under Florida Rule of Criminal Procedure 3.851and denied by this Court. To the extent that it is even possible, this Court should rehear Mr. Owen's previously denied claims and vacate Mr. Owen's death sentence.

6. Harmless error

None of the error pleaded in this case was harmless. The United States Supreme Court and the Florida Supreme Court have allowed harmless error analysis in determining whether to grant relief following *Hurst v. Florida* and subsequent cases. This, however, applies only to the claim involving the Sixth Amendment. With the Eighth Amendment, the state is prohibited from carrying out cruel and unusual punishment or arbitrary and capricious punishment. Ever. Accordingly, harmless error has no application to the violation of Mr. Owen's Eighth Amendment rights.

The advisory panel recommended death by a 10-2 margin. While this does not suffice to meet *Hurst v. Florida*'s jury requirement or *Hurst v. State*'s unanimity requirement, see *Caldwell,* it does counter any attempt by the State to show that the Sixth Amendment violations in this case are harmless - - beyond a reasonable doubt. Removed from the constitutional responsibility that subjected a fellow citizen to death, the advisory panel still returned a recommendation that would

have required a life sentence if the advisory panel were a jury acting under a constitutional system.

Moreover, Mr. Owen's case, as seen at trial and in postconviction was highly mitigated Mr. Owen presented compelling mental health mitigation that a properly instructed jury would find and give great weight, and find the facts necessary to return a life verdict. Upon review of the mitigation, Mr. Owen's case is clearly one of the most mitigated, even with the aggravating factors present in his case.

While the burden of proving harmlessness beyond a reasonable doubt lies solely with the State, the judicial considerations of newly discovered evidence should apply. In *Hildwin v. State*, 141 So. 3d 1178 (Fla.2014), the Florida Supreme Court explained then when presented with newly discovered evidence:

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

Id. at 1184. This includes the evidence adduced at trial and postconviction proceedings, "even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013)(citations omitted).

Any attempt by the State to argue that the constitutional violations argued in this motion were harmless beyond a reasonable doubt fail. This Court should vacate Mr. Owen's death sentence.

7. Conclusion

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from taking responsibility. For years, Florida told the advisory panel, incorrectly called a jury, that the

weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, the Florida Supreme Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility clearly lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Owen was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Owen's death sentence violates the Sixth, Eighth and Fourteenth Amendments and the Florida Constitution. This Court should vacate his sentence.

(E) PLEADING REQUIREMENTS OF FLORIDA RULE OF CRIMNAL PROCEDURE 3.851(E)(2)(c)

i. Witness Names, Addresses and Telephone Numbers

Any other witness necessary for a just determination of the issues.

ii. Witness Availability

Unknown

iii. Documents

The record on appeal from the direct appeal of Mr. Owen's death sentence.

The record on appeal from the appeal from the denial of postconviction relief.

The state and federal case law reporting the decisions in Mr. Owen's case.

iv. Prior Unavailability

Ring was available, and fully raised and exhausted by Mr. Owen on direct appeal. The Florida Supreme Court held:

> Owen next challenges the constitutional validity of Florida's death penalty scheme. We recently addressed Owen's contention that the Florida death penalty scheme is unconstitutional in *Bottoson v. Moore,* 833 So.2d 693 (Fla.), *cert. denied,* 537 U.S.

1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore,* 831 So.2d 143 (Fla.), *cert. denied,* 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. Owen is likewise not entitled to relief on this claim. Further, Owen's specific argument that his death sentence was unconstitutionally imposed because Florida's capital sentencing scheme fails to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances is unquestionably without merit. Recently, in *Doorbal v. State,* 837 So.2d 940 (Fla.), *cert. denied,* 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003), we held, "Because [the prior violent felonies] were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional." *Id.* at 963. As in *Doorbal,* the death penalty was constitutionally imposed upon Owen in light of the fact that the trial court properly applied the prior violent felony aggravating factor. Notably, the trial court highlighted the fact that Owen conceded that the prior violent felony aggravator was applicable in his case.

Owen's final argument is that the murder in the course of a felony aggravating factor is unconstitutional. We have repeatedly rejected this contention. *See Johnson v. Moore,* 837 So.2d 343, 348 (Fla.2002); *Blanco v. State,* 706 So.2d 7, 11 (Fla.1997). In *Blanco,* we wrote:

> Eligibility for this aggravating circumstance is not automatic: [t]he list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants.

706 So.2d at 11 (footnotes omitted).

Owen v. State, 862 So. 2d 687, 703–04 (Fla. 2003).

Hurst v. Florida and the Florida Supreme Court's subsequent decisions were not available for Mr. Owen to present his claims based on *Hurst*. *Hurst* gave the expanded claims contained in this motion viability. Mr. Owen submits that the decisions in *Hurst* v. *Florida* and the decisions that followed are changes in the law, clarification of existing law, and newly discovered evidence in the sense that *Hurst* overcame prior unconstitutional decisions that prevented a remedy for all of the constitutional violations that occurred in Mr. Owen's case. Mr. Owen asserts unequivocally

that these decisions are retroactive and that any decision to the contrary violates his rights. *Ring*, *Hurst* v. *Florida* and *Hurst v. State* apply retroactively to Mr. Owen's case. See *Mosley v. State*, No. SC14-2108, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016).

CONCLUSION AND RELIEF SOUGHT

Mr. Owen requests the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1. That he be allowed leave to amend this motion should new claims, facts, or legal precedent become available to counsel;

2. That he be granted an evidentiary hearing at a reasonable time if necessary; and

3. That his sentence of death be vacated.

CERTIFICATION

The undersigned attorneys hereby verify that the contents of this motion have been discussed fully with the Defendant, that Rule 4-1.4 of the Rules of Professional Conduct has been complied with, and that this motion is filed in good faith.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to all counsel of record and the assigned judge on January 6, 2017

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Attached: Copy of the Judgment and Sentence

EXHIBIT NO. 2

STATE ____ DEFENSE X COURT ____

CASE NUMBER(S) 84-CF-13346

DEFENDANT(S) Bobby Joe Long

FILED FOR IDENTIFICATION 5-1-19
(DATE)

ADMITTED IN EVIDENCE 5-1-19
(DATE)

CIRCUIT COURT
HILLSBOROUGH COUNTY
PAT FRANK, CLERK

BY Helen Anderson Deputy Clerk

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

CRIMINAL DIVISION: W
CASE NO.: 1984CF004014AXXXMB

v.

DUANE OWEN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE came before the Court on Defendant Duane Owen's ("Defendant") "Successive Motion to Vacate Judgment of Conviction and Sentence" (DE #306) ("Motion"), filed pursuant to Florida Rule of Criminal Procedure 3.851 on January 6, 2017. The State filed its Amended Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence[1] (DE #326) ("State's Response") on May 26, 2017, and the Court held a hearing at which the parties presented arguments on July 18, 2017. On September 28, 2017, Defendant filed his supplemental Briefing in Support of Vacating Death Sentences (DE #353) ("Supplemental Briefing"), and the State filed its Supplemental Response to Successive Motion to Vacate Sentence (DE #354) ("Supplemental Response"). The Court then held a final hearing on the issues presented on December 11, 2017. After conducting a thorough review of the court file and record in this case, the Court has carefully examined and considered Defendant's Motion and Supplemental Briefing, the State's Response and Supplemental Response, all arguments presented at the July 18

[1] The State filed its original Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence on May 25, 2017 (DE #325), but filed an Amended Response the following day. The Court considers the State's Amended Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence to be superseding.

and December 11, 2017 hearings, all supplemental authority filed by the parties,[2] and all applicable law.

FACTUAL AND PROCEDURAL HISTORY

Defendant was charged with first degree murder, sexual battery, and burglary relating to the March 24, 1984 murder of [redacted] Defendant forcibly entered a Delray Beach home where the victim was babysitting, stabbed and then sexually assaulted the victim. Defendant was arrested in May 1984 after he was identified as a burglary suspect. Defendant was questioned regarding the May 29, 1984 murder of [redacted] in Boca Raton (case no. 1984-CF-004000-AXXX-MB) when, during the course of several interrogations, Defendant confessed to the instant crimes and several other crimes, including the [redacted] murder. At trial for the charges in the instant case, the State presented Defendant's confession and corroborating evidence, including a bloody footprint found at the scene. The jury returned guilty verdicts on the charges and recommended death; the judge followed the jury's recommendation and imposed a death sentence.

Defendant appealed his convictions and sentence, and on March 1, 1990, the Florida Supreme Court reversed the convictions and remanded for a new trial after finding that Defendant's confession was obtained in violation of *Miranda v. Arizona*.[3] *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990). Before Defendant's retrial, the State moved for reconsideration in light

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[2] The State's supplemental authority, filed June 29, 2017 (DE #334), included *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017). Defendant's first supplemental authority, filed December 4, 2017 (DE #367), included penalty phase verdict forms from the following three cases: (1) *State v. Bannister*, No. 2011CF003085 (Fla. 5th Cir. Ct. Nov. 11, 2017); (2) *State v. Matos*, No. 2014-CF-005586-AXWS (Fla. 6th Cir. Ct. Nov. 21, 2017); and (3) *State v. Wells*, No. 2011-CF-000498-B (Fla. 8th Cir. Ct. Oct. 4, 2017). Defendant's second supplemental authority, filed December 21, 2017 (DE #373), included *Ellerbee v. State*, 42 Fla. L. Weekly S973a (Fla. Dec. 21, 2017), and *LeBron v. State*, 42 Fla. L. Weekly S986a (Fla. Dec. 21, 2017).

[3] 384 U.S. 436 (1966).

of the United States Supreme Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), which held that "neither *Miranda* nor its progeny require police officers to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his *Miranda* rights, thereafter makes an equivocal or ambiguous request for counsel." *State v. Owen*, 696 So. 2d 715, 717 (Fla. 1997) (describing the holding in *Davis*). The Florida Supreme Court ultimately ruled that while Defendant's responses were equivocal and *Davis* applied to Defendant's interrogation, the previous decision reversing Defendant's convictions was final and his prior convictions could not be retroactively reinstated. *Id.* at 720.

Defendant was re-tried in 1999 and was again convicted of first degree murder, as well as attempted sexual battery with a deadly weapon or force likely to cause serious personal injury and burglary of a dwelling while armed. Following the penalty phase, the jury recommended death by a vote of ten-to-two. The trial judge followed the jury's recommendation and imposed a death sentence, finding the existence of four aggravating circumstances: (1) the defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification (CCP). *Owen v. State*, 862 So. 2d 687, 690 (Fla. 2003). The trial court considered three statutory mitigating factors: (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to

conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three. *Id.* The trial court also considered sixteen non-statutory mitigating factors.[4] *Id.* at 690–91. The Florida Supreme Court affirmed Defendant's convictions and sentence on October 23, 2003. *Id.* at 704. The United States Supreme Court then denied Defendant's petition for writ of *certiorari* on November 15, 2004. *Owen v. Florida*, 543 U.S. 986 (2004).

Defendant filed his initial motion for post-conviction relief pursuant to rule 3.851 on November 1, 2005, raising eight claims that included numerous sub-issues. An amended motion was filed May 18, 2006, and following an evidentiary hearing on August 11, 2006, the trial court denied the motion by written Order of September 22, 2006. Defendant appealed the trial court's denial and petitioned the Florida Supreme Court for a writ of *habeas corpus*. *Owen v. State*, 986 So. 2d 534 (Fla. 2008). On May 8, 2008, the Florida Supreme Court affirmed the denial of post-

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[4] As related by the Florida Supreme Court, "The sixteen non-statutory mitigating factors were: (1) the defendant was raised by alcoholic parents (some weight); (2) the defendant was raised in an environment of sexual and physical violence (some weight); (3) the defendant was a victim of physical and sexual violence (some weight); (4) the defendant was abandoned by the deaths of his parents and abandoned by other family members (some weight); (5) the defendant has a mental disturbance and his ability to conform his conduct to the requirements of law was impaired (some weight) (6) the defendant was cooperative in court and not disruptive during court proceedings (little weight); (7) the defendant has made a good adjustment to incarceration and will be a good prisoner (little weight); (8) the offense for which the defendant was to be sentenced happened fifteen years ago (little weight); (9) the defendant will never be released from prison if given life sentences without parole (minimal weight); (10) the defendant cooperated with law enforcement (little weight); (11) the defendant obtained a high school equivalency diploma (little weight); (12) the defendant received a general discharge under honorable conditions from the United States Army (little weight); (13) the defendant saved a life in his youth (little weight); (14) the defendant suffered from organic brain damage (some weight); (15) the defendant lived in an abusive orphanage (some weight); and (16) any other circumstances of the offense (some weight). As to this final nonstatutory mitigating factor, the trial court considered the fact that Owen did not harm the two young children tha[redacted] was babysitting at the time of her murder, nor did he harm [redacted]'s two young children who were present in her home at the time of her murder." *Owen v. State*, 862 So. 2d at 690–91, n.3.

conviction relief and denied Defendant's petition for writ of *habeas corpus*. *Id.* at 560. Following these state proceedings, on August 7, 2008, Defendant filed a federal *habeas corpus* petition in the United States District Court for the Southern District of Florida, which was denied on November 30, 2010. *Owen v. Florida Dep't of Corrections*, 686 F.3d 1181, 1191 (11th Cir. 2012). On July 11, 2012, the Eleventh Circuit affirmed the denial of Defendant's federal *habeas* petition. *Id.* at 1202. The United States Supreme Court then denied Defendant's subsequent petition for writ of *certiorari* on April 29, 2013. *Owen v. Crews*, 569 U.S. 960 (2013).

On January 6, 2017, Defendant filed the instant Successive Motion to Vacate Judgment of Conviction and Sentence. In the Motion, Defendant requests that the Court vacate his death sentence, arguing that it is unconstitutional based on the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's subsequent decision on the remand of that case, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). A case management conference was held on July 18, 2017, at which counsel presented arguments to the Court. At the conclusion of the hearing, the Court provided counsel an opportunity to file supplemental briefing on the retroactivity of the *Hurst* decisions, and whether any *Hurst* error that may have occurred in this case could be considered harmless. Both Defendant and the State filed supplemental briefings on September 28, 2017. A final hearing on these issues was held on December 11, 2017.

LEGAL ANALYSIS AND RULING

In *Hurst v. Florida*, the Supreme Court held that Florida's capital sentencing scheme was unconstitutional to the extent that it failed to require the jury to make all factual findings necessary to impose a sentence of death. In so doing, the Supreme Court rejected Florida's use of an advisory verdict by the jury as "not enough." *Hurst v. Florida*, 136 S.Ct. at 619. The Supreme Court did not decide whether this sentencing error was subject to a harmless error analysis.

On remand, the Florida Supreme Court decided *Hurst v. State*. In *Hurst v. State*, the Florida Supreme Court held, *inter alia*, that all findings necessary for the imposition of a sentence of death in a capital case must be found unanimously by the jury.[5] Specifically, the jury must make a finding as to each aggravating factor that has been proven beyond a reasonable doubt, must find that the aggravating factors are sufficient, and must find that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 44.

Significantly, the Florida Supreme Court also addressed whether the sentencing error in *Hurst v. Florida* was subject to harmless error review. The Court concluded that the sentencing error was not a structural error and was, therefore, "not incapable of harmless error review." *Hurst v. State*, 202 So. 3d at 66-67.

It is clear in this case that the Defendant's death sentence was unconstitutional under *Hurst v. Florida* and *Hurst v. State*. However, not all death sentences are subject to review under *Hurst*. In *Asay v. State*, 210 So.3d 1 (Fla. 2016), the Florida Supreme Court held that *Hurst* does not apply retroactively to capital defendants whose sentences were final before *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* was decided on June 24, 2002. The Defendant's death sentence for the murder o[redacted] was not final on June 24, 2002. Therefore, in this case, the Defendant is entitled to review of his sentence of death in light of *Hurst*.[6]

The Defendant raises the following grounds for vacating his death sentence:

1. Based on *Hurst* his sentence is unconstitutional because he was denied a jury trial;

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[5] A unanimous verdict was not specifically required by the Supreme Court in *Hurst v. Florida*. The unanimity requirement was added by the Florida Supreme Court based on the right to trial by jury guaranteed by the Florida Constitution. *Hurst v. State*, 202 So. 3d at 53-54.

[6] The Defendant was also sentenced to death for the murder of [redacted]. *State v. Duane Eugene Owen*, Case No. 1984CF004000AMB. The Defendant's sentence in the [redacted] case became final before *Ring* and this Court has already denied the Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence in that case.

2. In light of *Hurst* his sentence violates the Eighth Amendment and is arbitrary and capricious;
3. The fact-finding necessary to support his sentence was not proven beyond a reasonable doubt as required by *Hurst*;
4. In light of *Hurst* his sentence was obtained in violation of the Florida Constitution; and
5. The denial of his post-convictions claims must be reheard and determined under a constitutional framework.

The starting point of this Court's analysis in considering the Defendant's request to set aside his death sentence must be the harmless error test enunciated by the Florida Supreme Court in *Hurst v. State*.[7]

A sentencing error is harmless "only if there is no reasonable possibility that the error contributed to the sentence." In the context of *Hurst*, this means that the burden is on the State to "prove beyond a reasonable doubt that the jury's failure to unanimously find all facts necessary for imposition of the death penalty did not contribute to the death sentence." *Hurst v. State*, 202 So. 3d at 68. The Florida Supreme Court emphasized that "[t]he focus is on the effect of the error on the trier of fact." *Id.*

Ground One

The first error alleged by the Defendant is the sentencing error found by the Supreme Court in *Hurst v. Florida* and by the Florida Supreme Court in *Hurst v. State*, the denial of a right to a

[7] The Court acknowledges that the Defendant does not concede the application of the harmless error test to each of the assigned errors. For example, the Defendant asserts that his Eighth Amendment challenge is not subject to harmless error review. As will be discussed below, the Court disagrees.

jury trial. This is a Sixth Amendment argument. The Defendant was denied the right to have a jury unanimously decide all facts necessary for the imposition his sentence of death.

As an initial matter, the Court must consider the Defendant's argument that the sentencing error cannot, under any circumstances, be harmless because the penalty phase jury verdict was not unanimous. In this case, the verdict was ten-to-two for death. The Defendant points out that the Florida Supreme Court has never found a *Hurst* error to be harmless in a case were the verdict was not unanimous. The Court accepts the Defendant's assertion that the Supreme Court has yet to find harmless error in any case where the verdict was not unanimous. This appears to be an accurate representation of the history of post-*Hurst* decisions by the Florida Supreme Court. However, the Court rejects the notion that a *Hurst* sentencing error can never be harmless if the original penalty phase verdict is less than unanimous.

First, the Florida Supreme Court has never held that a sentencing error could not be harmless unless there was a unanimous verdict. Second, to blindly determine harmless error based on the initial numerical vote of a jury that was not instructed that they needed to reach a unanimous verdict would make a harmless error analysis meaningless. Indeed, there would be no analysis. The Court does not believe that the Florida Supreme Court intended such a result. Certainly, the Florida Supreme Court expects, and demands, in cases involving the most serious and heinous crimes against our citizenry that harmless error does not simply rise or fall on the numerical vote of a jury who was not instructed as to the need for unanimity.

This does not mean that the lack of unanimity should not be a significant factor in determining harmless error. However, any meaningful review must also consider whether a rational jury instructed as to unanimity would find beyond a reasonable doubt the existence of

sufficient aggravators, that those aggravators outweighed any mitigating circumstances, and that an appropriately instructed jury would unanimously recommend a death sentence.

In this case, there were four aggravators to be considered. The aggravating circumstances were:

(1) The defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person. § 921.141(6)(b);

(2) The crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary. § 921.141(6)(d);

(3) The crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel ("HAC"). § 921.141(6)(h); and

(4) The crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification ("CCP"). § 921.141(6)(i).

While the Court's role is not to review the sufficiency of the evidence relating to these aggravating circumstances, in assessing the effect of the sentencing error on the trier of fact the evidence relating to each aggravator must be considered. Notably, the first two aggravators have already been found by a jury beyond a reasonable doubt.

The first statutory aggravator is a prior conviction for another capital offense or felony involving violence to some person. This aggravator is undisputed. At the time of the trial in this case, the Defendant had already been convicted of a capital offense for the brutal murder of [redacted]. *State v. Duane Eugene Owen*, Case No. 1984CF004000AMB. The [redacted] case involved facts similar to this case. In the [redacted] case, the Defendant entered the home of

[redacted]. Upon gaining entry to the home, the Defendant bludgeoned [redacted] to death with a hammer and sexually assaulted her.[8] A unanimous jury in the [redacted] case found beyond a reasonable doubt that the Defendant was guilty of first degree murder, sexual battery and burglary.

While Defendant's previous conviction for a capital offense – i.e. the murder of [redacted] - is the most significant and horrific felony involving violence to another person, the Defendant had also been convicted of other violent felonies. These felonies included attempted first degree murder, burglary of a dwelling while armed with a dangerous weapon, sexual battery with a deadly weapon and burglary of a dwelling with an assault or battery.

The second statutory aggravator has also been found by a unanimous jury. The jury in this case found that the Defendant committed the crime of burglary when he entered the residence where he ultimately raped and murdered [redacted] This aggravator, therefore, cannot be disputed.

The third and fourth statutory aggravators were not found unanimously by a jury. However, the evidence supporting these aggravators was significant and overwhelming. Both aggravators were addressed and discussed in this case by the Florida Supreme Court on direct appeal.[9]

The third aggravator, HAC, applies to murders that "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Owen v. State*, 862 So. 2d 687, 698-99 (Fla. 2003)

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[8] While not relevant to the harmless error analysis in this case, the jury recommended a sentence of death in the [redacted] case.

[9] This Court has independently reviewed the record evidence in this case. However, the Court cannot improve on the Florida Supreme Court's own observations and conclusions concerning HAC and CCP in this case.

(quoting *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998) and *Shere v. State*, 579 So. 2d 86, 95 (Fla. 1991)). This aggravator focuses on "the means and manner in which death is inflicted." *Owen, id.* at 699.

While this Court is not tasked with weighing the evidence of HAC, the Court must determine based on the record whether a properly instructed jury would find beyond a reasonable doubt the existence of HAC in the killing o[redacted]. There is no doubt that a rational jury would so find.

As detailed by the Florida Supreme Court, and as confirmed by this Court's independent review of the record, "Owen's killing o[redacted] unquestionably satisfies the requirement of HAC." *Owen, id* at 699-700. The Florida Supreme Court explained the record evidence of HAC as follows:

> Here, the medical examiner testified that [redacted] suffered eighteen stab wounds—eight to her upper back, four cutting wounds to the front of her throat, and six stab wounds to her neck. Five of the wounds penetrated her lungs, causing them to collapse, making it impossible for [redacted] to breath or speak. She would have experienced "air hunger"—the feeling of needing to breathe but not being able to do so. The doctor estimated that [redacted] lost nearly her entire blood volume. The result of severe blood loss is shock, an involuntary and uncontrollable condition that causes high anxiety and terror. The doctor explained that pain is a result of the nerve receptors in the skin being injured, and that people can experience a substantial amount of pain without suffering a lethal injury.
>
> Although [redacted] did not appear to have any defensive wounds, seven of the stab wounds were lethal and could have produced death. While the medical examiner could not determine which wounds were inflicted first, he believed they were all inflicted in rapid succession, and all while [redacted] was alive. The doctor opined that [redacted] would have been capable of feeling pain as long as she was conscious, which he estimated would have been for between twenty seconds and two minutes, depending upon which wound was inflicted first. He testified that one minute was a reasonable estimate for how long [redacted] remained conscious, as twenty seconds was too short, but two minutes would have been a "little long." During that time she would have felt pain, experiencing the additional stab wounds, would have felt terror and shock, would have been aware of her impending doom, would have become weaker as a result of blood loss, and would have been unable to cry out. Finally, according to the medical examiner, although she may have been dead prior to the occurrence, [redacted] was sexually assaulted, and semen was found on both her internal and external genitalia.

> In addition to the evidence presented by the medical examiner, the testimony of Owen's own mental health expert supports the finding of HAC. Dr. Frederick Berlin testified that Owen believed that by having sex with a woman he could obtain her bodily fluids, and that this would assist him in his transformation from a male to a female. Owen believed that if he had sex with a woman who was near death, his penis would act as a hose, and her soul would enter his body and they would "become one." Importantly, Owen believed that the more frightened the victim was, the better. This express need to cause his victim extreme fear clearly evinces an utter indifference to his victim's torture

Owen, id at 699. Based on the facts of this case, a properly instructed rational jury would find unanimously that the murder of [redacted] was heinous, atrocious and cruel.

The fourth aggravator was CCP. The Florida Supreme Court has established a four-part test to determine whether the CCP aggravator is justified. The test requires: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) the defendant must have had no pretense of moral or legal justification. *Owen, id.* at 862; *Evans v. State,* 800 So.2d 182, 192 (Fla.2001).

The Florida Supreme Court again detailed the record evidence supporting CCP in this case stating:

> Clearly, as with the [redacted] murder, the murder o[redacted] satisfies the requirements of CCP. The fact that Owen stalked [redacted] by entering the house, observing her, leaving, and then returning after the children were asleep demonstrates that this murder was the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Evans,* 800 So.2d at 192 (quoting *Jackson v. State,* 648 So.2d 85, 89 (Fla.1994)). Further, Owen unquestionably had "a careful plan or prearranged design to commit murder," *id.,* as evidenced by the fact that he removed his clothing prior to entering the house, wore socks and then gloves on his hands, confronted the fourteen-year-old girl with a hammer in one hand and a knife in the other, and, by his own admission, did not hesitate before stabbing [redacted] eighteen times.
>
> The third element of CCP, heightened premeditation, is also supported by competent and substantial evidence. We have previously found the heightened premeditation required to

> sustain this aggravator to exist where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. *See Alston v. State,* 723 So.2d 148, 162 (Fla.1998); *Jackson v. State,* 704 So.2d 500, 505 (Fla.1997). When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing [redacted]. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.
>
> Finally, the appellant unquestionably had no pretense of moral or legal justification. Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female.

Owen, id. at 701. As with HAC, a properly instructed rational jury would find beyond a reasonable doubt that the brutal murder o[redacted] was cold, calculated and premeditated.

Evidence of the aggravating factors in this case was overwhelming. Two of the aggravators were established by a unanimous jury beyond a reasonable doubt. Based on a review of the record evidence in this case, the Court concludes that a properly instructed jury would have found unanimously HAC and CCP beyond a reasonable doubt.

The Court next needs to consider the issue of sufficiency. Sufficiency is a consideration of the nature and weight of the aggravating factors without regard to any possible mitigating circumstances. The Court concludes that the any rationale jury properly instructed would unanimously find that the aggravating factors here were sufficient to support a sentence of death.

The aggravators in this case are the most serious aggravators in the statutory sentencing scheme. The Defendant had previously been convicted of a capital felony, the brutal murder of [redacted], and of other violent felonies. HAC and CCP were both present. There is

no doubt that a properly instructed jury in considering these aggravators would have unanimously found the aggravators to be sufficient to impose a sentence of death.

The Court must now consider whether a rationale jury properly instructed would find that the aggravators outweighed the mitigating circumstances. During the penalty phase, three statutory mitigating factors were presented along with sixteen non-statutory mitigating factors.

The statutory mitigating factors were: (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three.

Evidence of mental illness was presented at trial; however, the nature and extent of the Defendant's illness was vigorously challenged by the State. The jury, during the guilt phase, rejected the Defendant's insanity defense. During the penalty phase, the Defendant's experts relied heavily on Defendant's delusional belief that he was a woman. This belief was the lynchpin of the mental health opinions expressed by Dr. Berlin and Dr. Sultan.

The Defendant's mental health experts testified that, at the time of the offense, the Defendant suffered from an extreme mental or emotional disturbance. Specifically, the experts opined that the Defendant met "most" of the criteria for a delusional disorder and met the criteria for schizophrenia. Significantly, the defense experts premised their opinions on the Defendant's own questionable self-reporting of his delusions.

This self-reported delusion was never raised until 12 years after the murder o[redacted]. As noted by the Florida Supreme Court "Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He

did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female." *Owen, id.* at 701.[10] Nevertheless, while vigorously contested, there was some evidence to support this statutory mitigating circumstance.

There was little evidence in the record to support a finding that he did not appreciate the criminality of his conduct. To commit the crime, the Defendant wore socks over his hands to avoid detection. He showered after the murder, was careful not to take property from the home that could place him at the scene of the crime and he fled the scene. There is evidence to support a conclusion that he could not conform his conduct to the requirements of the law. He was, indeed, a repeat offender.[11]

There were 16 non-statutory mitigating circumstances presented during the penalty phase of the trial. Most of these mitigating factors do not require discussion. The most significant non-statutory mitigating circumstance was the Defendant's childhood and youth.

The evidence establishes that the Defendant was exposed to a horrific childhood. His parents were alcoholics. He witnessed his mother being abused and raped. The Defendant was physically and sexually abused. His mother passed away when the Defendant was a child and his father committed suicide. The Defendant was sent to the VFW National Home where the sexual and physical abuse continued. There can be no disputing that the Defendant's childhood, formative years and youth impacted him a profound way. As observed by the original trial court

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[10] The Supreme Court went on to state "Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive." *Owen, id.* at 701.

[11] The third statutory mitigating circumstances requires no discussion. It is undisputed that the Defendant was young, 23, at the time of the murder.

"is it any wonder the Defendant is, and has been, mentally sick?" Clearly, the evidence of this non-statutory mitigating circumstance was established at trial.

The ultimate issue left to be decided is whether the State has met its burden to "prove beyond a reasonable doubt that the jury's failure to unanimously find all facts necessary for imposition of the death penalty did not contribute to the death sentence." *Hurst v. State*, 202 So. 3d at 68. In post-*Hurst* cases where harmless error has been found, the Supreme Court has considered: 1) whether the aggravators were overwhelming and uncontroverted; 2) whether the defendant challenged the aggravators; 3) whether the mitigation was comparatively weak and challenged by the State; and 4) the numerical vote of the jury during the penalty phase. *See, e.g. King v. State*, 211 So. 3d 866, 892-93 (Fla. 2017).

The record evidence in this case overwhelmingly establishes that the statutory aggravators outweigh the mitigating circumstances. Two aggravators are uncontested and were found by a jury beyond a reasonable doubt. The mitigating circumstances were, by comparison, relatively weak and were vigorously contested by the State. Nevertheless, a jury hearing this evidence rendered a less than unanimous verdict recommending the imposition of the death penalty. The question is whether, without a unanimous verdict, the State has met its burden of establishing harmless error beyond a reasonable doubt? This Court readily concludes that the State has met its burden.

While the lack of a unanimous verdict poses a hurdle to finding harmless error, the Court must consider whether a rationale jury instructed on the need for a unanimous verdict to return a sentence of death would reach such a verdict in this case. In this case, the jury was instructed that its verdict was advisory only. The jury was further instructed that if a majority of the jury voted for the death penalty the verdict was a recommendation of death.

Properly instructed, the jury would have been told that: 1) at least one aggravating factor must be found unanimously; 2) the jury must find unanimously that the aggravating factor or factors found by the jury are sufficient to impose the death penalty; and 3) the jury must unanimously find that the aggravating factors outweigh the mitigating circumstances. The jury would also have been instructed that, regardless of the jury's findings, no juror is compelled to vote for death.

The difficulty in determining the impact of the error on the trier of fact as compelled by *Hurst v. State* is, of course, the need to speculate about why two jurors did not vote for death. However, every harmless error analysis requires a degree of speculation and an assessment of the unknown. This is why courts are required to look at the totality of the evidence to determine the impact of the error on the trier of fact.

The record evidence in this case can only support one conclusion. If the jury had been instructed on the need for a unanimous verdict the jury would unanimously find: 1) four aggravating factors including HAC and CCP; 2) the aggravating factors were sufficient to impose the death penalty; 3) the aggravating factors outweigh the mitigating circumstances; and 4) death was the appropriate penalty.

Ground Two

The Defendant next raises an Eighth Amendment challenge his death sentence. While the Defendant asserts that his sentence is "arbitrary and capricious" this argument is nothing more than a restatement and repackaging of the *Hurst* jury trial issue.[12] The Defendant asserts that because his right to jury trial was denied his sentence was violative of the Eighth Amendment.

[12] As will be discussed, all of the remaining grounds for vacatur of the Defendant's death sentence are all based on *Hurst*.

The Defendant also asserts that an Eighth Amendment violation is not subject to harmless error review.

The Defendant is correct that a sentence of death without a unanimous jury verdict is violative of the Eighth Amendment. This was the holding of the Florida Supreme Court in *Hurst v. State*. *Hurst v. State*, 202 So. 3d at 59-60. However, it is equally clear that a *Hurst* Eighth Amendment violation is subject to a harmless error analysis. *See, e.g. Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018)(defendant's Eighth Amendment violation under *Hurst* harmless beyond a reasonable doubt).

The Court has already addressed whether the *Hurst* error in this case under the Sixth Amendment was harmless beyond a reasonable doubt. The same analysis applies to the Defendant's Eighth Amendment *Hurst* claim. For the reasons already expressed, the Court concludes that the State has met its burden to demonstrate that the Eighth Amendment *Hurst* error in this case is harmless beyond a reasonable doubt.

Grounds Three Four and Five

The Defendant asserts three additional grounds to vacate his sentence of death. The Defendant asserts as additional grounds: (1) The fact-finding necessary to support his sentence was not proven beyond a reasonable doubt as required by *Hurst*; (2) In light of *Hurst* his sentence was obtained in violation of the Florida Constitution; and (3) The denial of his post-convictions claims must be reheard and determined under a constitutional framework.

All of these grounds are nothing more than a repackaging of the original *Hurst* error. They are each based on the right to a jury trial under the Sixth Amendment and pursuant to article I, section 22 of the Florida Constitution. No additional analysis of these claims is required. Each is subject to the same *Hurst* harmless error review previously discussed and as to each additionally

asserted ground the State has met its burden to demonstrate that the error is harmless beyond a reasonable doubt.

For the foregoing reasons, it is hereby,

ORDERED AND ADJUDGED that Defendant Duane Owen's Successive Motion to Vacate Judgment of Conviction and Sentence is **DENIED**.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida this _9th_ day of May, 2018.

JUDGE GLENN D. KELLEY
CIRCUIT COURT JUDGE

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CASE NO: **84-CF-013346-A**
APPEAL NO: **SC19-726**

CERTIFICATE OF CLERK

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, PAT FRANK, CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF HILLSBOROUGH, STATE OF FLORIDA, DO HEREBY CERTIFY THAT THE FOREGOING PAGES **6415** TO **6458** CONTAIN A CORRECT COPY OF THE APPEAL RECORD IN THE CASE OF

ROBERT JOE LONG
APPELLANT
VS

STATE OF FLORIDA
APPELLEE

AND A TRUE AND CORRECT RECITAL AND INCLUSION OF ALL SUCH ORIGINAL PAPERS AND PROCEEDINGS IN SAID CAUSE AS IT APPEARS FROM THE RECORDS AND FILES OF MY OFFICE THAT HAVE BEEN DIRECTED TO BE INCLUDED IN SAID RECORD BY THE DIRECTIONS FURNISHED TO ME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF SAID COURT ON THIS THE 8TH DAY OF MAY, 2019.

Isomar Molina

AS DEPUTY CLERK
84-CF-013346-A, 5/8/2019 01:24 PM