IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1356
L.T. No. 1994-CF-4667

KEN E. LOTT, Appellant,

vs.

STATE OF FLORIDA, Appellee.

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant's Judgment and Sentence of death became final before the June 24, 2002 date of Ring v. Arizona, 536 U.S. 584 (2002). This brief is primarily an effort to persuade this court to revisit its decisions in Assay v. State, 210 So.2d 1 (Fla. 2016) and Mosley v. State, 209 So.3d 1248 (Fla. 2016) and Hitchcock v. State, 226 So. 3d 2016 (Fla. 2017), which decisions deny Hurst v. Florida, 577 U.S. ____(2016), 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 41 (Fla. 2016) (collectively referred to as the "Hurst" cases) relief to Appellant and other, similarly situated, death-sentenced Florida prison inmates whose death sentences became final prior to the 2002 date of the Ring decision.

In this brief, Defendant Ken Lott is referred to variously as "Ken Lott" and "Appellant" and "Defendant." References to the Record on Appeal which was created for the present appeal of the trial court's order denying Appellant's Hurst-based, successive motion for postconviction relief are made with the letter "R" followed by the supporting Record Volume number, followed by the applicable Record page numbers.

STATEMENT OF THE CASE AND FACTS

The evidence presented in the original jury trial of this death-penalty case were accurately described in this Florida Supreme Court's 1997 direct appeal Opinion affirming Appellant's Judgment and Sentence of death as follows:

On the morning of March 28, 1994, Rose Conners was found murdered, lying unclothed in the master bedroom of her home. The right side of Conners' throat had been slashed, her larynx had been fractured, she had been struck in the head with a blunt object and she had a single stab wound in the back. There were duct tape lines on her legs, arms, and face suggesting that Conners was bound and gagged prior to being killed and that the tape was removed after her death. There were bruises on Conners' arm matching the imprint of a set of pliers found at the scene. The medical examiner testified that the blow to Conners' head in combination with the pressure to her neck rendered her unconscious. The blow to Conners' head was inflicted anywhere between a few minutes and thirty minutes before her neck was cut. The injury to her neck, which partially cut the jugular vein, was the cause of Conners' death. The medical examiner estimated that Conners died sometime between 2 p.m. on Saturday, March 26, 1994 (the last time Conners was known to be alive), and 5 p.m. on Sunday, March 27, 1994. Although there was no evidence of sexual battery found by the medical examiner, there was significant bruising in the thigh area, suggesting that pressure had been applied to force her legs apart. Conners had a defensive wound on her right thumb. Abrasions were found on Conners' elbows and knees and her torn panties were found underneath a bed in another bedroom of her house.

When Conners' sister went through Conners' effects, it was discovered that Conners' diamond tennis bracelet was missing. In April of 1994, Lott offered to sell a gold ring and a diamond tennis bracelet to David Pratt, a friend, but Pratt refused the offer. Sometime after Easter of 1994, Lott went over to Robert Whitman's house and stated that he had some jewelry, which included a gold ring and a diamond tennis bracelet that came from a robbery and murder in Jacksonville, that he wanted to get rid of. A week later, Lott returned to Whitman's house and told Whitman that Lott and a friend, Ray Fuller, had killed Rose Conners. Lott told Whitman that he and Fuller had been using "crystal meth" and cocaine, and when they ran out of money and drugs they decided to rob Conners. Lott knew Conners because a few months before he had provided lawn services to her. Lott and Fuller planned to have Fuller tie, gag, and blindfold Conners since she did not know Fuller. However, Conners saw Lott when she

escaped from the house and Lott had to come out from the bushes where he was hiding to catch her and bring her back inside.

Lott told Whitman that Conners had no cash--only gold and jewelry. Lott said that he beat Conners because she was fighting like a mad dog when he grabbed her and brought her back into the house. Lott said Conners begged him not to kill her and offered to sign her car over to them and take them to the bank to get money. Lott also told Whitman that he had to kill Conners because she knew him and would send him to prison. He said he cut Conners' throat with a boning or fillet knife. Lott also said that he returned to Conners' house that night and cleaned up the scene.

In May of 1994, Robert Whitman contacted the Orange County Sheriff's Department and reported what he had been told by Lott. The sheriff's department devised a plan to have Whitman meet with Lott regarding the stolen jewelry. At this meeting Whitman told Lott he would sell the jewelry for him and then gave Lott $600 for the jewelry. When Lott drove off, sheriff's deputies pursued him and took him into custody.

In addition, the State submitted fingerprint, shoe print, and fiber evidence establishing Lott's presence at the scene and proof that Lott was in possession of Conners' diamond tennis bracelet, ring, and ATM card shortly after the crime. The State argued that Lott used a pair of pliers on Conners' arm when questioning her about her valuables and her PIN number for her ATM card. Photographs taken by Conners' bank established that Lott used Conners' ATM card to retrieve money from a cash machine on Sunday, March 27, 1994. Coworkers of Lott's wife testified that Lott's wife was seen wearing Conners' tennis bracelet subsequent to Conners' death.

Because all of the evidence of what occurred during the murder consisted of testimony by Whitman concerning what Lott told him, Lott predicated his defense on the theory that he was set up by Whitman. Whitman admitted that he had been convicted of three or four felonies. He further admitted that he had been supplying drugs to Lott. Whitman also said that twenty-three years ago Lott had informed on him and gotten him in trouble with the law. Lott asserted that

Whitman made up the story of Lott murdering Conners because Whitman wanted revenge for that incident.

The jury found Lott guilty of first-degree murder. At the sentencing phase, the jury recommended death by a unanimous vote. Lott later testified at a sentencing hearing held pursuant to Spencer v. State, 615 So.2d 688 (Fla.1993), that he had been in Conners' master bathroom in February of 1994 giving her advice about plantings outside her window, and that is how his palm print came to be on the sink. He had no explanation for the existence of prints in the other bedroom or his shoe prints in another part of the house. Lott also admitted that he was the person who used Conners' card at the ATM, but he contended that he got the card and the PIN number from Whitman and did not notice that Rose Conners' name was on the card.

The trial court found that the following aggravators applied to Lott: (1) he had a previous conviction for a violent felony based on three prior armed robbery convictions and one prior attempted escape conviction; (2) the murder was committed during the commission of a burglary and/or kidnapping; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the murder was committed for pecuniary gain; (5) the murder was especially heinous, atrocious, or cruel (HAC); and (6) the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (CCP).

The trial court also found that the following mitigators applied: (1) the murder was committed while Lott was under the influence of extreme mental and emotional disturbance (given considerable weight by the trial court); (2) Lott's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (given considerable weight by the trial); (3) that Lott suffered from drug addiction (given considerable weight by the trial court); (4) that Lott contributed to his community through volunteer work (given slight weight by the trial court); (5) that Lott was helpful to his parents as a child and an adult (given some weight by the trial court); and (6) that Lott maintained steady and gainful employment (given some weight by the trial court).

> The trial court found that the aggravating circumstances outweighed the mitigating circumstances and followed the jury's recommendation that Lott be sentenced to death.
>
> Lott v. State, 695 So.2d 1239 (Fla. 1997)

In such direct appeal, Appellant argued –unsuccessfully-- that the trial court made the following, guilt-phase errors:

- Insufficient evidence of guilt
- Error in excluding evidence of co-defendant's reputation for untruthfulness
- Error in refusing to allow Appellant's mother to give a hearsay account of how Appellant told her he had done lawn care work for the victim
- Error in allowing gruesome photographs into evidence
- Error in declining to sanction State witnesses who violated the rule of sequestration of witnesses

In such direct appeal, Appellant also argued –also unsuccessfully—that the trial court made the following penalty-phase errors:

- Error in instructing the jury on the "heinous, atrocious and cruel" aggravator
- Error in admitting evidence of Appellant's prior escape conviction
- Error in instructing the jury on the "cold, calculated and premeditated" aggravator
- Disproportionality of Appellant's death sentence

Lott v. State, 695 So.2d 1239 (Fla. 1997).

For purposes of the present appeal, it is noted that the jury's unanimous death-sentence decision was rendered on June 9, 1995. R1, p. 179. The trial court's Judgment and Sentence of death were entered on June 23, 1995. R1, p. 181-191. This Florida Supreme Court's above-quoted direct-appeal Opinion affirming such Judgment and Sentence of Death were entered on May 22, 1997 (reh. den. June 20, 1997). It was not until five years later, in 2002, that the United State's Supreme Court issued its landmark Ring v. Arizona, 536 U.S. 584 (2002) ruling.

This case progressed beyond the initial, unsuccessful, "direct" appeal to the Florida Supreme Court to Appellant's initial motion for postconviction relief. In it, Appellant alleged that his trial counsel had been ineffective in (1) investigating his alibi, (2) preparing the clinical psychologist for the penalty phase, (3) challenging the forensic evidence, (4) investigating how Lott obtained the victim's PIN number, and (5) interfering with Appellant's right to testify, and (6) cumulative error. At the same time, Appellant pursued –but was denied-- a Rule 3.853 motion for DNA testing.

With regard to such six "ineffective assistance of counsel" claims raised in such initial postconviction relief motion, this Florida Supreme Court affirmed all of the trial court's findings of no ineffectiveness. This Florida Supreme Court

explained that the Appellant "has proven neither deficient performance nor prejudice" and that the Appellant's ineffectiveness claims "did not undermine this (Florida Supreme) Court's confidence in the verdict or sentence." Lott v. State, 931 So.2d 807, at 814 and 820 (Fla. 2006).

With respect to the trial court's denial of Appellant's motion for DNA testing, this Florida Supreme Court also affirmed, explaining that the Appellant failed to show how such proposed DNA testing would either exonerate him of the crime or mitigate his sentence. Id., at pp. 820-821.

Appellant then filed his subject, successive motion for postconviction relief. R1, p. 130-152. It contains three claims. First Appellant asserted that, under the recent case law, he might be intellectually disabled and hence exempt from the death penalty. Id, p. 133-135. Second, Appellant asserted that his death sentence is unconstitutional under the Sixth and Eighth Amendments to the U.S. Constitution and under Article 1, Sections 16 and 22 of the Florida Constitution in light of Hurst v. Florida, 136 S. Ct. 616 (2016), hereinafter "Hurst," and Hurst v. State, 202 So. 3d 40 (Fla. 2016). Id., p. 135-149. Thirdly, and also based on Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016), Appellant asserted that the State's failure to identify aggravating circumstances in the Indictment vitiates his judgment of guilt and sentence of death for first-degree murder. Id. p. 149-150.

The successive postconviction motion court gave Appellant all of the time and resources he requested to develop all three claims. This included the appointment and service of a reputable neuropsychologist, Dr. Harry Krop, who assisted the defense with the intellectual disability claim.

After much time and effort, the defense had to admit to the trial court that it lacked the evidence needed to establish "intellectual disability" by present standards. However, the defense pointed out to the trial court that "intellectual disability" is an evolving concept. The defense asked that any denial of the "possible intellectual disability" claim be "without prejudice." On May 15, 2019, with the permission of the trial court and without any objection by the State, the defense withdrew the "possible intellectual disability" claim. R1, p. 367-370.

That left two remaining, successive postconviction motion claims: (A) that Appellant's death sentence is unconstitutional under the Sixth and Eighth Amendments to the U.S. Constitution and under Article 1, Sections 16 and 22 of the Florida Constitution in light of Hurst v. Florida, 577 U.S. ____ (2016), 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016), [R1, p. 135-149] and (B) that the State's failure to identify aggravating circumstances in the Indictment vitiates his judgment of guilt and sentence of death for first-degree murder, as also established by Hurst v. Florida, 577 U.S. ____ (2016), 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016) [R1, p. 149-150].

These remaining two successive postconviction motion claims are pure issues of law. There are no factual disputes. No evidentiary hearing was required. The trial court heard final legal argument on them on July 25, 2019. At such hearing, the undersigned counsel for Appellant conceded –as he had to-- that this Florida Supreme Court ruled in Asay v. State, 210 So.3d 1 (Fla. 2016) that Hurst does not apply retroactively to death-sentenced inmates like Appellant, whose judgments and sentences of death became final prior to the 2002 decision in Ring v. Arizona, 536 U.S. 584 (2002). R1, p. 383-390. However, the undersigned counsel for Appellant also argued that this Florida Supreme Court's decision in Asay is wrong (Id., p. 388-389). The undersigned added that all of both sides' arguments and authority on such issue of retroactivity were already "of record" in the written, successive motion for postconviction relief and the State's written Response to it and the Appellant's Reply to such Response. Id. p. 387.

On July 26, 2019 the trial court entered its final Order denying successive postconviction relief on these remaining two claims. R1, p. 347-349.

In order for Appellant to prevail on these remaining two claims at the present, Florida Supreme Court appeal level, Appellant must persuade this Florida Supreme Court to revisit and reverse its decisions in Asay v. State, 210 So.3d 1 (Fla. 2016) and Mosley v. State, 209 So.3d 1248 (Fla. 2016), and Hitchcock v. State, 226 So. 3d 216 (Fla. 2017) which hold that Hurst is inapplicable to death-

sentenced inmates like Appellant, whose judgments and sentences of death became final before the 2002 date of Ring v. Arizona, 536 U.S. 584 (2002). That is what Appellant is endeavoring to do this in this appeal.

SUMMARY OF ARGUMENT

Experience shows that, as well-intentioned as this court's Asay and Mosley and Hitchcock, *supra,* decisions were, their limiting of Hurst relief to only those inmates whose death sentences became final before the 2002 date of Ring v. Arizona, 536 U.S. 584 (2002) has resulted a situation in which perpetrators of recent, more-aggravated, recent murders, get a second chance at a life sentence whereas perpetrators of older, less-aggravated murders do not. This is contrary to the long-established principle of proportionality in criminal sentences and warrants this court revisiting and reversing its prior decisions in Asay and Mosley and Hitchcock, and now affording Hurst relief to *all* Florida death-sentenced inmates.

In addition, the facts and applicable law in the present Appellant's individual case render his death sentence unconstitutional under both the United States and Florida Constitutions in light of Hurst. Also in light of Hurst, the State's failure to identify aggravating circumstances in the Indictment vitiates Appellant's judgment of guilt and sentence of death.

STANDARD OF REVIEW

The issues raised in this appeal are pure questions of law, subject to *de novo* review. State v. Coney, 845 So.2d 120, 137 (Fla. 2003).

ARGUMENT WITH REGARD TO EACH ISSUE

ISSUE 1: The principle of sentencing proportionality justifies departure from *stare decisis* and should be done to extend the death-sentencing procedure changes required by the Hurst retroactively to the to Appellant and all other, similarly situated, death-sentenced inmates whose death sentences became final before the 2002 date of Ring v. Arizona

Initially, it is noted that Appellant could not "preserve" the issue of this Florida Supreme Court revisiting and reversing its prior Asay and Mosley and Hitchcock rulings because Florida trial courts cannot overrule or recede from the controlling decision of a higher, appellate court. System Components Corp v. Florida Dept. of Transp., 14 So.3d 967 (Fla. 2009). When a point of law has been settled by decision of the same or of a superior court, it forms a precedent from which departure should generally not be made. State v. Dwyer, 332 So. 2d 333 (Fla. 1976), State v. Lott, 286 So.2d 565 (Fla. 1973). An inferior court lacks the power to overrule the decisions of the Florida Supreme Court State Ex rel. Florida Dry Cleaning and Laundry Bd. v. Atkinson, 188 So. 834 (1938).

However, it *is* appropriate for Appellant to now urge this Florida Supreme Court to depart from its own precedent in its Asay and Mosley and Hitchcock because, although *stare decisis* normally requires deference to prior precedent,

where departure is necessary to vindicate other principles of law or to remedy continued injustice, prior precedent will be abandoned. Haag v. State, 591 So.2d 614 (Fla. 1992).

The "other principle of law" justifying this court's departure from its Asay and Mosley and Hitchcock rulings is the principle of sentencing proportionality. With regard to life-or-death sentences in first-degree murder cases, this Florida Supreme court always engages in proportionality review. In summing up this Florida Supreme Court's longstanding practice of conducting proportionality review in death penalty cases, the Florida Third District Court of Appeal explained:

> . . . as the Florida Supreme Court has long held, a "proportionality review requires a 'discrete analysis of the facts, entailing a qualitative review by this court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' " Ocha v. State, 826 So.2d at 965–66 (quoting Urbin v. State, 714 So.2d 411, 416 (Fla.1998)). See also Silvia v. State, 60 So.3d 959, 974 (Fla.2011) (holding that a proportionality analysis entails a qualitative, rather than a quantitative, review of the aggravating and mitigating circumstances). Thus, under a proportionality analysis, the trial court would have been required to review the facts and circumstances regarding the offenses committed, not just the crimes that were charged, as well as all of the aggravating and mitigating circumstances, which obviously would have included Perez–Diaz's lengthy criminal record and Mailin's cooperation with the State. Moreover, proportionality reviews are conducted in death penalty cases because the death penalty is "reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So.2d 954, 965 (Fla.1996). Thus, when deciding whether death is a proportionate penalty, the court must perform a

> "comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." Silvia v. State, 60 So.3d at 974 (internal quotation and citation omitted). "Accordingly, the court considers the totality of the circumstances and compares the case with other similar capital cases." Id.
>
> State v. Perez-Diaz, 189 So.3d 896, 900 (Fla. 3d DCA 2016)

The purpose of Florida Supreme Court proportionality review in death-sentence cases is to ensure that death not be imposed as punishment for murder in cases similar to those in which death was deemed an improper punishment. Voorhees v. State, 699 So.2d 602 (Fla. 1997). In reviewing the proportionality of a sentence in a capital proceeding, the Florida Supreme Court follows precedent that requires that the death penalty be reserved only for those cases where the most aggravating and least mitigating circumstances exist. Hurst v State, 202 So. 3d 40 (Fla. 2016). Assuring that death is a "proportional" sentence prevents the violation of the United States and Florida constitutional prohibitions of unusual punishment. Gosciminski v. State, 132 So. 3d 678 (Fla. 2013), Caylor v. State, 78 So. 3d 482 (Fla. 2011), Jackson v. State, 18 So. 3d 1016 (Fla. 2009).

Without a doubt, jury death-sentence decisions are far less likely now, in a post-Hurst new penalty phase than before. Now, all twelve jurors must unanimously find at least one aggravating circumstance, followed by all twelve jurors agreeing that such unanimously-found aggravators, considered alone, do

justify the death penalty, followed by consideration of mitigating circumstances, followed by all twelve jurors agreeing that the aggravating circumstances outweigh the mitigating circumstances, followed by none of twelve jurors exercising their individual right to void imposition of the death penalty. Florida Statutes Section 921.141, Florida Standard Jury Instructions in Criminal Cases, Instruction 7.11, Final Instructions in Penalty Proceedings – Capital Cases. In this regard, a death-sentenced inmate's receipt of a new penalty phase is far more likely to result in a more lenient sentence of life without parole.

Currently, there are Florida death-sentenced inmates who have been convicted of relatively recent, more-aggravated murders who *do* receive a new penalty phase, with its second chance for a life sentence, and other Florida death-sentenced inmates who have been convicted of older, less-aggravated murders who do not. For example, Troy Victorino, a death-sentenced Florida inmate that the undersigned has represented after conviction, was convicted of the baseball-bat murders of six people in a single, August 6, 2004 incident. The incident has been dubbed "the Deltona massacre" by the popular media. Based on Hurst, and the limited-retroactivity rule of Asay v. State, 210 So.3d 1 (Fla. 2016) and Mosley v. State, 209 So.3d 1248 (Fla. 2016), Troy Victorino has been granted a new penalty phase. Victorino v. State, 23 So. 3d 87 (Fla. 2009), Victorino v. State, 241 So. 3d 48o (Fla. 2018). Simlarly, Michael James Jackson, another Florida death-

sentenced inmate that the undersigned has represented after conviction, was convicted and sentenced to death for burying two elderly people alive. Based on Hurst, and the limited-retroactivity rule of Asay v. State, 210 So.3d 1 (Fla. 2016) and Mosley v. State, 209 So.3d 1248 (Fla. 2016), Michael James Jackson has been granted a new penalty phase. State of Florida v. Michael James Jackson, Duval County Felony Case No. 2005-CF-10263, Jackson v. State, 18 So. 3d 1016 (2009), Jackson v. State, 127 So.3d 447 (Fla. 2013). In contrast, the present Appellant, who was sentenced to death for the stabbing murder of a single victim on March 26, 1994, has been denied a new penalty phase based on the same Asay v. State, 210 So.3d 1 (Fla. 2016) rule of limited retroactivity. R1, p. 347-349.

This situation is contrary to the principle of proportionality in criminal sentencing and warrants this Florida Supreme Court revisiting its Asay and Mosley and Hitchcock rulings and holding instead that experience and the principle of proportionality in criminal sentencing compel revising previous rulings and extending the right to a new penalty phase which was established in Hurst retroactive to all death-sentenced Florida prison inmates. This is not to say that the Florida courts were wrong in affording Hurst relief to Troy Victorino and Michael Jackson. Rather, this is to say that the Florida courts did not foresee the present death-sentence proportionality problems and did not go far enough when they limited Hurst relief to just those whose death sentences became final after the 2002

date of Ring. Appellant respectfully requests that this reviewing court enter its Opinion and Order remanding Appellant's case back to the trial court for a new sentencing phase compliant with Hurst and with Florida Statutes Section 921.141, Florida Standard Jury Instructions in Criminal Cases, Instruction 7.11, Final Instructions in Penalty Proceedings – Capital Cases.

The manner in which Asay and Mosley and Hitchcock were applied to limit the retroactive application of Hurst deprived the Appellant of a Hurst-compliant new penalty phase and thus violated the prohibitions against cruel and unusual punishment contained in Article 1, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution. It also denied Appellant his right to a fair jury trial, as secured by Article 1, Sections 16 and 22 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. It also denied the Appellant his right to due process of law, as secured by Article 1, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

ISSUE 2: Defendant's death sentences are unconstitutional under the Sixth and Eighth Amendments to the U.S. Constitution and Article 1, Sections 16 and 22 of the Florida Constitution in light of Hurst v. Florida and Hurst v. State and must be vacated

A. Background and introduction

Defendant was convicted of murder and sentenced to death in 1995 in the Ninth Judicial Circuit Court in and for Orange County. *See* Lott v. State, 695 So.

2d 1239 (Fla. 1997). The "advisory" jury unanimously recommended the death penalty. R1, P. 178-179. The court, not the jury, then made the findings of fact required to impose a death sentence under Florida law. R1, P. 181-191. The court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) Defendant had a previous violent felony conviction; (2) The offense was committed during the commission of a burglary and/or kidnapping; (3) The offense was committed for the purpose of avoiding or preventing arrest; (4) The offense was committed for pecuniary gain; (5) The offense was heinous, atrocious, or cruel; and (6) The offense was committed in a cold, calculated, and premeditated manner. *Id.* The court also found numerous mitigating circumstances.[1] The court, not the jury, then found beyond a reasonable doubt that those aggravators were "sufficient" to impose the death penalty, and were not outweighed by the mitigation. *Id.* Based upon its fact-finding, the court sentenced Defendant to death. *Id.* at p. 151.

The Florida Supreme Court affirmed Defendant's conviction and sentence. Lott v. State, 695 So. 2d 1239, 1245 (Fla. 1997). The Florida Supreme Court later

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[1] The court found the following mitigators: Defendant (1) was under the influence of extreme mental and emotional disturbance during the offense; (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; (3) suffered from drug addiction; (4) contributed to his community through volunteer work; (5) was helpful to his parents as a child and an adult; and (6) maintained steady and gainful employment. *Id.*

[2] In addition to the fundamental fairness doctrine, the *Hurst* decisions are separately retroactive to Defendant under a traditional *Witt* analysis. There is no dispute that Defendant's *Hurst* claims

affirmed the denial of his Rule 3.850 motion for post-conviction relief. Lott v. State, 931 So. 2d 807 (Fla. 2006). Defendant's subsequent attempts to obtain federal habeas relief were unsuccessful. *See* Lott v. Attorney Gen., Florida, 594 F. 3d 1296, 1303 (11th Cir. 2010).

This "Issue 2" is brought pursuant to the recent rulings in Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). Such Hurst decisions hold unconstitutional death sentences which, like the present Defendant's death sentences, were imposed without the requisite jury findings and sentencing. Such rulings did not occur until after the trial and initial postconviction motion proceedings in this case.

Defendant's death sentence is unconstitutional under the Sixth and Eighth Amendments to the United States Constitution in light of Hurst v. Florida and Hurst v. State. Both Hurst decisions should apply retroactively to Defendant's case under state and federal law. The State cannot meet its burden of proving beyond a reasonable doubt that the Hurst error was harmless. Accordingly, for the reasons explained below, the trial court erred in not affording the present Appellant Hurst relief. Appellant requests that this reviewing court issue its Opinion and Order directing the trial court to vacate Appellant's death sentence and grant Appellant a new penalty phase trial.

Defendant's death sentence violates Hurst v. Florida and Hurst v. State. In Hurst v. Florida, 136 So. Ct. at 620-622, 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. 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 Supreme 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, 202 So.3d at 53-59, the Florida Supreme 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. The 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, the 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 the elements required to impose the death penalty, 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, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

The Florida Supreme Court also ruled that Hurst claims must be subjected to individualized harmless error review, and that the burden is on the State to prove, beyond a reasonable doubt, that the Hurst error did not impact the sentence. *Id.* at

67-68. If the State is unable to make that showing, this court should vacate the death sentence.

Defendant's jury was never asked to render 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, Defendant's jury rendered only a generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factors were proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation.

Accordingly, Defendant's death sentence violates the Sixth and Eighth Amendments to the United States Constitution and must be vacated.

Defendant should be afforded retroactive application of both Hurst decisions on three independent grounds: (1) under the fundamental fairness doctrine, which the Florida Supreme Court has applied in cases including Mosley and James v. State, 615 So. 2d 668 (Fla. 1993); (2) under the traditional Florida retroactivity analysis established in Witt v. State, 387 So. 2d 922 (Fla. 1980); and (3) as a matter of federal law in light of the United States Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

B. Asay and Mosley require individualized retroactivity analysis for Hurst claims

Contrary to traditional notions of retroactivity as a binary concept—*i.e.*, a new constitutional rule is either retroactive to all cases or to none—Asay and Mosley establish that determining retroactivity in Hurst cases requires individualized assessments much in the same way that harmless error must be assessed on a case-by-case basis. *Cf.* Mosley, 209 So. 3d 1248, 1282 ("As we determined in Hurst, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase."). Individualized retroactivity analysis is necessitated in part by the fact that in Mosley, the court held that the Hurst decisions may be found retroactive *either* by virtue of Florida's traditional Witt test, *or* under the separate fundamental fairness doctrine. In order to assess retroactivity under the fundamental fairness approach, courts must review and assess all of the facts of each case.

In Asay and Mosley, the Florida Supreme Court suggested that courts must first conduct an individualized assessment in order to decide which Hurst decision or decisions to analyze for retroactivity, and then to decide whether to apply the Witt test, the fundamental fairness approach, or both. For example, the Court assessed retroactivity in Asay only as to Hurst v. Florida, while in Mosley, the

court also addressed Hurst v. State. In Mosley, the court then applied two independent retroactivity analyses—Witt and fundamental fairness—and reached separate conclusions under each approach. Mosley, 209 So. 3d at 1274-83. In Asay, the court applied Witt, but not fundamental fairness, suggesting a case-specific reason for the omission.

Even in applying a traditional Witt analysis, the court reached individualized conclusions in Asay and Mosley as to the dispositive third Witt prong, which requires examination of three factors borrowed from Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1965). In Asay, the court ruled that the first Stovall/Linkletter factor—the purpose of Hurst—weighed "in favor" of retroactivity, while in Mosley, the court ruled that the purpose of the same Hurst decisions weighed "*heavily* in favor of retroactivity." *See* Asay, 210 So. 3d at 18; Mosley, 209 So. 3d at 1278 (emphasis added). As to the second factor—extent of reliance on pre-Hurst law—the court found in Asay that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactivity, while in Mosley, the court reached the opposite conclusion, holding that the extent of reliance on the same pre-Hurst law weighed "in favor" of retroactivity. See Asay, 210 So. 3d at 20; Mosley, 209 So. 3d at 1281. Asay and Mosley also differed as to the third Stovall/Linkletter factor—effect on the administration of justice—finding that it weighed "heavily against"

retroactive application as to Mr. Asay, but in favor of retroactive application as to Mr. Mosley. See Asay, 210 So. 3d at 22; Mosley, 209 So. 3d at 1283.

C. Defendant is entitled to an individualized retroactivity analysis

An individualized assessment is first necessary to determine that Defendant is entitled to retroactivity of the Hurst decisions under the fundamental fairness doctrine, due to his repeated attempts to challenge Florida's unconstitutional capital sentencing scheme, all of which were thwarted by the Florida Supreme Court's pre-Hurst law. An individualized assessment is also necessary to determine that Defendant is separately entitled to retroactivity of the Hurst decisions under Florida's Witt test, given that the Stovall/Linkletter factors as applied in his case align with the Florida Supreme Court's analysis in Mosley, where, unlike in Asay, retroactivity was found.

Defendant's individualized retroactivity assessment must, unlike in Asay, consider his claims under both Hurst v. Florida and Hurst v. State. In Asay, the Florida Supreme Court limited its retroactivity analysis to the United States Supreme Court's decision in Hurst v. Florida and did not consider the retroactivity of Hurst v. State. Here, there is no justification for cabining the retroactivity analysis to Hurst v. Florida. Unlike in Asay, Defendant's claims are being filed in this court after the decision in Hurst v. State, and Defendant affirmatively raises

both Sixth Amendment claims under Hurst v. Florida and Eighth Amendment claims under Hurst v. State.

D. Hurst is retroactive to Defendant under the fundamental fairness doctrine

The Hurst decisions apply retroactively to Defendant under the equitable "fundamental fairness" doctrine, which the Florida Supreme Court has applied in cases such as Mosley. In Mosley, the court explained that although Witt is the "standard" retroactivity test in Florida, defendants may also be entitled to retroactive application of the Hurst decisions by virtue of the fundamental fairness doctrine, which had been applied in other Florida cases. See Mosley, 209 So. 3d at 1274 ("This court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty"). Unlike the Mosley court's Witt analysis, which considered whether Mosley's sentence became final after the Ring decision as a factor in assessing Hurst retroactivity, the Florida Supreme Court's fundamental fairness analysis made no distinction between pre-Ring and post-Ring sentences. Id. at 1274-75. Rather, the Mosley court's separate fundamental fairness analysis focused on whether it would be unfair to bar Mr. Mosley from seeking Hurst relief, regardless of when his sentence became final, by virtue of the fact that he had previously attempted to

challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Florida Supreme Court's flawed pre-Hurst law. Id. at 1275.

Although Mosley was a post-Ring case, the Florida Supreme Court's fundamental fairness approach applies to pre-Ring defendants, who may also obtain retroactive Hurst relief on fundamental fairness grounds. See id. at 1276 n.13 ("The difference between a retroactivity approach under James and a retroactivity approach under a standard Witt analysis is that under James, a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this court would grant relief. However, using a Witt analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument."). In other words, to the extent Mosley stands for the proposition that defendants sentenced after Ring are categorically entitled to Hurst relief under Witt, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the Hurst decisions as a matter of fundamental fairness.

In assessing fundamental fairness, the Mosley court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before Hurst v. Florida and Hurst

v. State were decided. See id. at 1275. If Mosley had raised such a challenge, the court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under Hurst, given that he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in the Hurst decisions. See id. The Mosley court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State's interest in finality of death sentences. Id. ("In this instance . . . the interests of finality must yield to fundamental fairness.").

To illustrate why the Hurst decisions should apply to Mosley as a matter of fundamental fairness, the Florida Supreme Court drew a historical analogy to James's retroactive application of the United States Supreme Court's decision in Espinosa v. State, 626 So.2d 165 (Fla. 1993). Id. In James v. State, 615 So. 2d 668 (Fla. 1993) the court concluded "that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC ("heinous, atrocious and cruel") aggravating factor was unconstitutionally vague were entitled to the retroactive application of Espinosa." Id. The Mosley court held that "[t]he situation presented by the United States Supreme Court's holding in Hurst is not only analogous to the situation presented by James, but also concerns a decision of greater fundamental importance than was at issue in James." Id. The court was correct because, under Hurst v. Florida and Hurst v. State, "the fundamental right

to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." Id. (internal quotation omitted). The application of the fundamental fairness retroactivity doctrine thus makes as much sense for Hurst claims as Espinosa claims.

Here, as in Mosley, the Hurst decisions are retroactive under the fundamental fairness doctrine. Although Defendant's direct appeal was pre-Ring, he attempted to challenge Florida's unconstitutional capital sentencing statute before Hurst. In 1994, prior to his jury trial, Defendant filed a detailed, pre-trial motion challenging the constitutionality of Florida's capital sentencing scheme (R1, p. 157-168, denied at R1, p. 172-177) and continued to press his challenges to the scheme on direct appeal. The Florida Supreme Court stated only that "[w]e reject, without discussion, Lott's arguments . . . that Section 921.141, Florida Statutes (1993), is unconstitutional." Lott, 695 So. 2d at 1245. Under the rationale of Mosley, these circumstances provide a sufficient basis to apply the Hurst decisions retroactively to the present Appellant, regardless of the fact that his sentence became final before the issuance of Ring. See Mosley, 209 So. 3d at 1276 n.13. Applying the Hurst decisions retroactively to the present Appellant "in light of the rights guaranteed by the United States and Florida Constitutions,

supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." Mosley, 209 So. 3d at 1283.[2]

E. Defendant has a federal right to Hurst retroactivity

Even if the Hurst decisions did not apply retroactively to Defendant's death sentence under state law, the United States Constitution requires this court to apply Hurst retroactively in this case. While Florida may maintain its own state retroactivity doctrines, the United States Constitution sets a retroactivity "floor" to which all state retroactivity determinations must adhere. Under federal principles, Hurst v. Florida and Hurst v. State should be applied retroactively to Defendant and other similarly situated prisoners without regard to when their death sentences became final on direct appeal. The concept of "partial retroactivity," whereby a

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[2] In addition to the fundamental fairness doctrine, the *Hurst* decisions are separately retroactive to Defendant under a traditional *Witt* analysis. There is no dispute that Defendant's *Hurst* claims satisfy the first two *Witt* prongs because they (1) arise from decisions of the United States Supreme Court and the Florida Supreme Court, and (2) are constitutional in nature. As applied to Defendant, the third *Stovall/Linkletter* factor—the effect on the administration of justice—also weighs in favor of applying the *Hurst* decisions retroactively. As recognized in *Asay*, this factor does not weigh against retroactivity unless applying the *Hurst* decisions retroactively could "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So.2d at 929–30). In *Mosley*, the Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, of which there are approximately 175, would not grind this state's judiciary to a halt. *See Mosley*, 209 So. 3d at 1281. In light of that conclusion, there can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants, like Defendant, of which there are also only approximately 175, would tip the balance so far in the other direction as to "destroy" the judiciary. Accordingly, the third *Stovall/Linkletter* factor, like the first two factors, weighs in favor of applying the *Hurst* decisions retroactively to Defendant under the *Witt* test.

constitutional rule is applied retroactively to some cases on collateral review but not others, cannot be squared with the Eighth and Fourteenth Amendments.

The Supremacy Clause of the United States Constitution requires state post-conviction courts to apply "substantive" constitutional rules retroactively. See Montgomery v. Louisiana, 136 S. Ct. 718, 731-32 (2016) ("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."). This federal constitutional requirement applies even where a state supreme court has a separate retroactivity doctrine. See id. That was the issue before the United States Supreme Court in Montgomery, wherein a Louisiana defendant brought a state post-conviction proceeding seeking retroactive application of Miller v. Alabama, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The Louisiana Supreme Court denied Miller relief on state retroactivity grounds. Montgomery, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the Miller constitutional rule was substantive, the state court was obligated to apply it retroactively. See id. at 732-34.

Florida's state courts are required to apply Hurst retroactively to all death-sentenced prisoners because the Hurst decisions established substantive rules

within the meaning of federal law. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. Hurst v. State, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. See Montgomery, 136 S. Ct. at 734 (decision whether juvenile is person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule).

Second, an Eighth Amendment rule was established requiring the jury to make those three beyond-a-reasonable-doubt findings unanimously. The substantive nature of the unanimity rule is apparent from this court's explanation in Hurst v. State that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states

and with federal law." Id. As a matter of federal retroactivity law, the rule is therefore substantive. See Welch v. United States, 578 U.S.____, 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"). This is true even though the rule's subject concerns the method by which a jury makes its decision. See Montgomery, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The logic supporting Hurst retroactivity is not undermined by Schriro v. Summerlin, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that Ring was not retroactive in the federal habeas context under the federal retroactivity test articulated in Teague v. Lane, 489 U.S. 288 (1989). Summerlin did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were sufficient to impose death. And with Hurst, unlike in Summerlin, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment's jury-trial guarantee. See Summerlin, 542 U.S. at 353. Moreover, Hurst, unlike Ring, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. See, e.g., Ivan V. v. City of New York, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional

standard of proof beyond a reasonable doubt announced in [In re Winship, 397 U.S. 358 (1970)] 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."); Powell v. Delaware, 153 A.3d 69 (Del. 2016) (holding Hurst retroactive under Delaware's state Teague-like retroactivity doctrine and distinguishing Summerlin on the ground that Summerlin "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). Federal judges in Florida have already recognized the impact of the standard of proof on the retroactivity of Hurst. See, e.g., Guardado v. Jones, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that Hurst may be retroactive because "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.") (citing Ivan V.).

The United States Supreme Court's decision in Welch is illustrative of the substantive nature of Hurst. In Welch, the court addressed the retroactivity of the rule articulated in Johnson v. United States, 576 U.S. _____,135 S. Ct. 2551, 2560 (2015). In Johnson, the court held that a federal statute that allowed sentencing enhancement was unconstitutional. Id. at 2556. In Welch, the court held that Johnson's ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. Welch, 136 S. Ct. at 1265. The court

emphasized that its determination whether a rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." Id. at 1266. In Welch, the court pointed out that, "[a]fter Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence." Id. Thus, "Johnson establishes, in other words, that even the use of impeccable fact-finding procedures could not legitimate a sentence based on that clause." Id. "It follows," the court held, "that Johnson is a substantive decision." Id. (internal quotation omitted).

The same reasoning applies in the Hurst context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rulings within the meaning of federal law because they place certain murders "beyond the State's power to punish," Welch, 136 S. Ct. at 1265, with a sentence of death. Following the Hurst decisions, "[e]ven the use of impeccable fact-finding procedures could not

legitimate a sentence based on" the judge-sentencing scheme. Id. And in the context of a Welch analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment," Hurst, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in Welch makes clear that a substantive rule, rather than a procedural rule, resulted from the Hurst decisions. See Welch, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

The concept of "partial retroactivity" is inconsistent with federal law, which traditionally accepts only a binary approach to retroactivity analysis. In contrast, a framework that allows state courts to select which capital cases on collateral review can receive the retroactive benefit of a constitutional rule of law and which will not, based on the sentence's temporal relation to some precedent that came before the rule was announced, violates the Constitution. Under federal law, there is no such thing as partial retroactivity. If a state court decides that a constitutional rule is retroactive to some cases on collateral review, it cannot deny retroactivity to other cases based solely on the date the death sentence became final on direct appeal relative to some prior precedent.

Here, under federal law, Defendant's right to Hurst retroactivity should not be impacted by the date his sentence became final relative to Ring or any other antecedent case. After all, partial retroactivity leads to arbitrary and impermissible results. For instance, if a retroactivity "line" is drawn at Ring, it would result in the denial of Hurst relief to individuals like Defendant whose death sentences became final on direct appeal shortly before Ring, while at the same time granting Hurst retroactivity to other individuals who arrived on death row years, or perhaps decades, earlier but were granted new penalty phases and then resentenced to death after Ring. Failure to extend Hurst retroactivity to pre-Ring prisoners would violate the Eighth Amendment's requirement of culpability-related decision-making in capital cases, and the Fourteenth Amendment's requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

In the final analysis, the idea of partial retroactivity violates the Eighth and Fourteenth Amendment prohibition against arbitrariness in imposing death sentences. The death penalty does not hold up when imposed under "sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976); see also

Furman v. Georgia, 408 U.S. 238, 310 (1972) ("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.") (Stewart, J., concurring).

Partial retroactivity smacks of such unconstitutional arbitrariness. For instance, the date of finality relative to Ring might depend on whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the court's summer recess; how long the assigned Florida Supreme Court Justice took to draft the opinion; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error so that the court had to issue a corrected opinion; whether appellate counsel chose to file a petition for a writ of certiorari or first, sought an extension for such a petition, or how long that petition remained pending in the United States Supreme Court; and so on. The itemization of factors can go on and on and all of them—from the perspective of whether a death sentence should be carried out in an individual case—are arbitrary and capricious.

There are other arbitrary factors affecting whether a defendant might get Hurst relief under a partial retroactivity approach, such as whether a resentencing was held or other intervening factors. For example, even "older" cases dating back to the 1980s with a post-Ring resentencing would be subject to Hurst, while other

less "old" cases would not. See, e.g., Johnson v. State, 205 So. 3d 1285 (Fla. 2016), granting Hurst relief to defendant whose crime occurred in 1981 but was granted relief on a third post-conviction motion in 2010, years after the Ring decision); See also Card v. Jones, 219 So.3d 47 (Fla. 2017), granting Hurst relief to defendant whose crime occurred in 1981 but who was granted relief on a second post-conviction motion in 2002—just four days after Ring was decided); 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 ten-year delay before the trial.

F. The Hurst error in Defendant's case was not harmless Beyond a reasonable doubt

Because Defendant's death sentence violates Hurst v. Florida and Hurst v. State, and those decisions are retroactive to him under state law and federal law, he should be granted relief unless the State can prove that the Hurst error in his case was "harmless beyond a reasonable doubt." The Florida Supreme Court defines "harmless beyond a reasonable doubt" as "no reasonable probability that the error contributed to the sentence." Hurst v. State, 202 So. 3d at 68.

G. The State bears the burden of establishing harmlessness

The Florida Supreme Court has repeatedly held that the burden is on the State to prove, beyond a reasonable doubt, that the Hurst error did not impact the defendant's death sentence. See Id. at 67-68 ("[T]he 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."). The "State bears an extremely heavy burden" in this context. Id. at 68. A court's finding that a Hurst error was harmless will be "rare." King v. State, 211 So. 3d 866, 890 (Fla. 2017).

H. The Florida Supreme Court has indicated that a unanimous jury recommendation is a factor in Hurst analysis, but not necessarily a dispositive factor in every case

The Florida Supreme Court has indicated that a unanimous jury recommendation is a factor in Hurst harmless error analysis, but not necessarily a dispositive factor in every case. The court has emphasized this principle on several occasions. In Hall v. State, 212 So. 3d 1001 (Fla. 2017) at 1034-35, the court stated that a jury's unanimous recommendation "lays a foundation for us to conclude beyond a reasonable doubt" that the Hurst error was harmless, and then assessed other harmlessness factors, such as the "egregious facts" of the case, reflecting a traditional harmless error analysis that evaluated the aggravation and mitigation. (emphasis added). Again in King v. State, the court emphasized that the unanimous recommendation was not dispositive, but rather "begins a foundation for us to conclude beyond a reasonable doubt" that the Hurst error was harmless. 211 So. 3d 866, 890 (emphasis added). In Wood v. State, 209 So. 3d 1217, 1234 (Fla. 2017), the court indicated that a Hurst error in a unanimous-

recommendation case would—if the case were not already being remanded for imposition a life sentence on other grounds—require a remand for a new penalty phase because the jury had been instructed to consider inappropriate aggravators.

More recently, in Jones v. State, 212 So.3d (Fla. 2017) the court explained that the instructions to the jury, in combination with the unanimous recommendation, allowed the court to conclude that three of the required elements for a death sentence had been satisfied—sufficiency of the aggravation, weight of the aggravation relative to the mitigation, and the unanimous recommendation—but that an individualized examination of the specific aggravators found by the judge was still necessary to determine whether "the remaining element: that the jury unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt"—was satisfied. 212 So. 3d 321, 343 (internal quotes omitted). Thus, the court has made clear that in some unanimous recommendation cases the Hurst error was not harmless. Defendant's is such a case.

The Hurst error in Defendant's case should not be ruled harmless beyond a reasonable doubt, not only due to the problems inherent in using the advisory jury's recommendation to infer what fact-finding would have occurred in a constitutional proceeding, but also because the circumstances of this case reflect, more other unanimous-recommendation cases the Florida Supreme Court has addressed, a reasonable probability that the Hurst error impacted the sentence.

I. In Defendant's case, the jury's unanimous recommendation is insufficient to reliably conclude that the jury would have unanimously found all of the required elements in a constitutional proceeding, particularly in light of the jury's belief about its role and the substantial mitigation

In Defendant's case, the jury's unanimous recommendation is insufficient to reliably conclude that the jury would have unanimously found all the required elements for the death penalty satisfied in a constitutional proceeding, particularly in light of the jury's belief about its role in sentencing and the substantial mitigation. As a general matter, it is only logical that a unanimous pre-Hurst jury recommendation does not serve as a complete bar to Hurst relief under the harmless error doctrine. After all, Florida juries before Hurst, including Defendant's, made only a general recommendation to impose the death penalty, without deciding if any of the other required elements had been satisfied. In Hurst v. State, the Florida Supreme Court held that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, on all of the required elements for a death sentence: (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. The jury's unanimous findings on those elements must precede the jury's vote as to whether to recommend a death sentence. See id. 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.").

Therefore, even in cases where the jury unanimously recommended death, there is no way to know whether the jury would have unanimously found all the other preceding elements satisfied beyond a reasonable doubt. See Hall v. State, 212 So. 3d 1001, 1037 (Fla. 2017) (Quince, J., dissenting) ("Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown."). Indeed, Defendant's jurors may have reached a unanimous overall recommendation, but there is nothing in the record that reveals the basis for the recommendation, and there is therefore a reasonable probability that each juror, or groups of jurors, may have based their recommendations on a different calculus. The Florida Supreme Court has made clear that all jurors must be on the same page with respect to each of the underlying elements.

Additionally, as the Florida Supreme Court cautioned in Hurst v. State, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; see also Mosley, 209 So. 3d 1248, 1283. The reasoning the court supplied in declining to

speculate about the jury's fact-finding in Hurst v. State, even though that case involved a non-unanimous jury recommendation, applies equally to Defendant'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.
>
> Hurst v. State, 202 So. 3d at 68.

Here too, this court cannot determine what aggravators Defendant's jury found proven beyond a reasonable doubt, how many jurors found which particular aggravators sufficient for death, or how the jurors conducted the weighing process (particularly given the uncertainty about what aggravators each juror considered in the first place).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of the principles articulated in the United States Supreme Court's decision in Caldwell v. Mississippi , 472 U.S. 320, 105 S. Ct. 2633 (1985). In Caldwell, the Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. Id. at 328-29. The Supreme Court explained 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, and 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, 341 (internal quotation omitted).

Defendant's jury was led to believe that its role in sentencing was diminished when the court instructed it that its sentence was advisory. It was with these instructions in mind, which informed Defendant's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," id. at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty. Given the jury's belief that it was not ultimately responsible for the imposition of Defendant's death sentence, this court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous recommendation without the Hurst error. In light of the principles articulated in Caldwell, this court therefore also cannot be certain, to the exclusion of all reasonable doubt, that the jury would have unanimously found all of the other required elements satisfied. And, of course, the court cannot be sure that the jury would have declined to exercise its discretion to

unanimously recommend a life sentence after itself making the findings on the other required elements.

Moreover, the jury's consideration of the mitigation in Defendant's case may have been significantly impacted by the jury's knowledge that it was not ultimately responsible for the sentence. In a constitutional proceeding, where the jury was properly apprised of its role as fact-finder, the jury may have afforded greater weight to the mitigation in Defendant's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific 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). In Hurst v. State, this Florida Supreme Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("Because we do not have an interrogatory verdict commemorating the findings of the jury . . . we 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.").

In the present Appellant's case, the court found the following mitigators: Defendant (1) was under the influence of extreme mental and emotional disturbance during the offense; (2) his capacity to appreciate the criminality of his

conduct or to conform his conduct to the requirements of the law was impaired; (3) suffered from drug addiction; (4) contributed to his community through volunteer work; (5) was helpful to his parents as a child and an adult; and (6) maintained steady and gainful employment. Lott v. State, 695 So. 2d at 1242. Given this mitigation, there is a reasonable probability that at least some jurors in a constitutional proceeding, having been properly advised of their role as fact-finder in deciding whether to sentence Defendant to death, would have decided that the death penalty should not be imposed.

J. Defense counsel's approach to diminishing the aggravating factors and presenting mitigation would be different in a constitutional proceeding

The jury's unanimous recommendation in Defendant's case also does not account for the likelihood that defense counsel's approach to diminishing the weight of the aggravators and presenting mitigation at the penalty phase would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty. Counsel may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order for Defendant to avoid a death sentence. Defense counsel's approach to the evidence may have been different had the jury, rather than the judge, been required to unanimously find that each specific aggravator had been proven beyond a reasonable doubt. In a constitutional

proceeding, defense counsel may have successfully diminished or eliminated some aggravators.

Defense counsel's approach may also have been different had the jury, as opposed to the judge, been required to unanimously make the "sufficiency" and "insufficiency" findings regarding the aggravating factors. In addition, counsel's approach to the mitigation may have differed in a penalty phase where the jury rendered the findings regarding the weight of aggravation relative to mitigation. Counsel's thinking also may have been impacted had he known the jury would be instructed that it was entitled to recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied. Counsel may have given different advice to Defendant, and the decision-making may have been different.[3]

K. To the extent the State may argue that the Hurst error is harmless due to the judge's finding of certain aggravators based on prior or contemporaneous convictions, the Florida Supreme Court has explicitly rejected that argument

To the extent the State may argue that the Hurst error is rendered harmless by the fact that, among the aggravators applied to Defendant, were those based on

[3] To the extent this Court needs further evidence that the errors were not harmless, a hearing is appropriate to probe the impact of the *Hurst* errors on defense counsel's strategy and presentation. The Florida Supreme Court has approved of such hearings in similar contexts. In *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the Court, while considering a habeas petition raising a claim under *Hitchcock v. Duggar*, 481 U.S. 393 (1987), determined that the Defendant was entitled to an evidentiary hearing on the issue of harmless error and remanded. Here, as in *Meeks*, this Court should allow a hearing so that it can make findings of fact regarding harmlessness.

contemporaneous and prior felony convictions, the Florida Supreme Court has rejected the idea that a judge's finding of such aggravators is relevant in the harmless-error analysis of Hurst claims, and has granted Hurst relief despite the presence of such aggravators. See, e.g., Franklin v. State, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from Ring and Hurst v. Florida."); McGirth v. State, 209 So. 3d 1146, 1151 (Fla. 2017) (contemporaneous felony); Mosley, 209 So. 3d 1248, 1256 (contemporaneous felony); Armstrong v. State, 211 So. 3d 864, 865 (Fla. 2017) (prior violent felony); Calloway v. State, 210 So. 3d 1160, 1176 (Fla. 2017) (prior violent felony).

L. This court should reject any suggestion in some prior cases that an advisory jury's unanimous recommendation is a factor to consider in Hurst harmless error analysis because such reliance violates the United States Constitution

Although it is not necessary for resolving the harmless error inquiry in Defendant's favor, there are significant reasons grounded in federal constitutional law that this court should reject any reliance on the advisory jury's unanimous recommendation. Under the Sixth Amendment, any reliance on the jury's recommendation is problematic in light of Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993). In Sullivan, the Supreme Court emphasized that "[h]armless-error review looks, we have said, to the basis on which the jury actually rested its verdict." Id. at 279 (emphasis in original) (internal quotation marks omitted). In

Defendant's case, there was no constitutionally valid jury verdict on the critical findings of fact required to impose a death sentence. Sullivan requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although Sullivan addressed a jury verdict as to guilt, the logic of Sullivan applies equally in the capital penalty-phase context:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.
>
> Id. at 279-80

In the present Defendant's case, any reliance on his advisory jury's unanimous recommendation would be a violation of the Sixth Amendment.

Reliance upon an advisory jury's unanimous recommendation also runs afoul of the Fourteenth Amendment. The Due Process Clause requires that, in all criminal prosecutions, the State must prove each element beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. In Sullivan, the Supreme Court observed that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." Sullivan, 508 U.S. at 278. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Id. This requirement is clearly incorporated into the Hurst line of cases, beginning with Apprendi v. New Jersey, 500 U.S. 466 (2000) ("[A]ny 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.") (emphasis added). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Because Florida's pre-Hurst jury

determinations, including the unanimous advisory recommendation here, did not incorporate the beyond-a-reasonable-doubt standard, it would violate due process to rely on them.

Accordingly, Defendant's sentence of death is unconstitutional and illegal and Defendant respectfully requests that this reviewing court enter its Order reversing the trial court's decision to the contrary and remanding the case for a new sentencing phase compliant with Hurst.

ISSUE 3: The State's failure to identify aggravating circumstances in the Indictment vitiates defendant's judgment of guilt and sentence of death for first-degree murder

The charging Indictment (R1, P. 154-156) does not identify the aggravating circumstances upon which the State based its pursuit of the death. Defendant filed a pre-trial motion (R1, P. 158-167 and R1, p. 170-171) to require the State to provide a statement of particulars identifying the specific aggravating circumstances it was relying on in pursuit of the death penalty and to dismiss the Indictment for its lack of such. The motion was denied. R1, p. 173-177.

The essential elements that make a particular murder a capital offense in light of the Hurst decisions are not currently in the legal definition of first-degree murder under Section 782.04, Florida Statutes. Such essential elements –in this instance, the aggravating circumstances supporting the death sentence—were neither in Defendant's charging Indictment nor in the applicable statutory

definition of first-degree murder. Given this, the grand jury indictment upon which the Defendant was prosecuted is fatally defective and the Petitioner was convicted of a non-existent crime - i.e. "aggravated" first-degree murder.

The Indictment upon which Defendant was tried, (R1, P. 154-156), did not contain the essential elements necessary to make the offense charged subject to capital punishment as required by Article 1, Section 15(a) of the Florida Constitution. This assertion is based on the Hurst decisions, Hurst v. Florida, 136 S.Ct. 616 (2013) and Hurst v. State, 202 So.3d 40 (Fla. 2016).

In State v .Gray, 435 So.2d 816, 818 (Fla. 1983), the Florida Supreme Court held "a conviction on a charge not made by the indictment or information is a denial of due process of law."

The failure to identify the aggravating circumstances in the Indictment violated Appellant's rights to due process of law secured by Article 1, Section 9 of the Florida Constitution and by the Fifth and Fourteenth Amendments to the United States Constitution. This Florida Supreme Court should reverse the lower court's decision to the contrary and remand this case back to the trial court with instructions to vacate Appellant's Judgment and sentences.

CONCLUSION

For all of the reasons given above, this Florida Supreme Court should recede from its prior decisions denying Hurst relief to Defendants like the Appellants

whose Judgments and Sentences of death became final before the 2002 date of the United States Supreme Court's Ring v. Arizona decision. Additionally, and also based on all of the reasons given in this brief, the Appellant respectfully requests that this Florida Supreme Court enter its Opinion and Order vacating Appellant's Judgment of guilt for first-degree murder and sentence of death, or, alternatively, vacating Appellant's death sentence and remanding the case back to the trial court for a new life-or-death penalty phase trial.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is in Times New Roman 14-point font and complies with this Court's font and formatting requirements.

(Certificate of Service on next page)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the State Attorney, representing the State of Florida, and to the Attorney General, also representing the State of Florida, through the Florida Courts e-filing portal, and by U.S. Mail to Inmate Ken E. Lott, DC# 026985, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083 on October 21, 2019.

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