No. SC17-___

IN THE

Supreme Court of Florida

DONALD LEE BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Robert R. Berry
Assistant Collateral Regional Counsel-North
175 Salem Court
Tallahassee, FL 32301
robert_berry@ccrc-north.org
(850) 942-8818
Florida Bar No. 714216

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS

RULES

INTRODUCTION

Petitioner Donald Lee Bradley's death sentence became final after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). His petition asks the Court to review his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Those decisions should be applied to this post-*Apprendi* case under this Court's retroactivity standards as well as under the standards of federal retroactivity law.

Although this Court has already made clear that the *Hurst* decisions apply retroactively to death sentences that became final after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court has not yet provided an opinion specifically discussing *Hurst* retroactivity for the small number of death sentences that became final during the two-year period between *Apprendi* and *Ring*. The same *Hurst* retroactivity analysis that this Court has extended to all post-*Ring* death sentences should extend to post-*Apprendi* death sentences, including Petitioner's, because *Apprendi* is the constitutional basis for *Ring* and for the *Hurst* decisions.

There are 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver. Here, the *Hurst* error is not harmless since the advisory jury recommended a death sentence by a vote of 10 to 2. Petitioner requests that this Court grant a writ of habeas corpus under the *Hurst* decisions, vacate his death sentence, and remand for a new penalty phase.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9), of the Florida Constitution. This proceeding is also authorized by Florida Rule of Appellate Procedure 9.030(a)(3). This petition complies with Rule 9.100(a) requirements.

REQUEST FOR ORAL ARGUMENT

This petition presents important retroactivity arguments based on the "post-*Apprendi*" posture of this case. Petitioner respectfully requests oral argument.

REQUEST THAT THIS HABEAS CORPUS ACTION NOT BE STAYED PENDING THE DECISION IN *HITCHCOCK*

The *Apprendi* retroactivity arguments presented by this habeas corpus petition are not briefed in the pending appeal in *Hitchcock*, No. SC17-445. Petitioner urges the Court to independently evaluate this post-*Apprendi* petition, address the important issues concerning post-*Apprendi* retroactivity it raises, and not stay these habeas proceedings pending the decision in *Hitchcock*.

BACKGROUND

In 1998, Petitioner was convicted of murder in the Circuit Court of the Fourth Judicial Circuit, in and for Clay County. *See Bradley v. State*, 787 So. 2d 732, 736 (Fla. 2001). The jury returned a generalized advisory recommendation to impose the death penalty by a vote of 10 to 2.

The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court, not the jury, specifically found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the offense was heinous, atrocious, or cruel; (2) the offense was committed in a cold, calculated, and premeditated manner; (3) the offense was committed for pecuniary gain; and (4) the offense was committed while engaged in the commission of a burglary. *See Bradley v. State*, 33 So. 3d 664, 670 n.4 (Fla. 2010). The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the aggravators were not outweighed by the mitigation.[1] Based upon the court's own fact-finding, the court sentenced Petitioner to death. *See Bradley*, 787 So. 2d at 738.

During the pendency of Petitioner's direct appeal, the United States Supreme Court decided *Apprendi* on June 26, 2000, but this Court thereafter affirmed Petitioner's death sentence on March 1, 2001. *See id*. at 734. Petitioner's sentence became "final" on November 26, 2001, when the United States Supreme Court

[1] The mitigation the trial court found included: (1) Petitioner had no significant history of prior criminal activity; (2) Petitioner's age at the time of the crime; (3) Petitioner overcame a chaotic childhood and dysfunctional family life to make real achievements in his own life, including establishing loving relationships in his family and reestablishing a relationship with his father; (4) Petitioner had been a good provider and father for his present wife and his children; (5) Petitioner loved his family and was loved by them; (6) Petitioner maintained a good employment record; (7) Petitioner was helpful to other people inside and outside his family; and (8) Petitioner showed sincere religious faith. *See id.*

denied his petition for a writ of certiorari. *Bradley v. Florida*, 534 U.S. 1048 (2001); *see also* Fla. R. Crim. P. 3.851(d)(1)(B) (providing that a Florida conviction and sentence becomes final on direct appeal upon the United States Supreme Court's disposition of a petition for a writ of certiorari). Seven months later, the United States Supreme Court decided *Ring*.

This Court subsequently affirmed the denial of Petitioner's initial Florida Rule of Criminal Procedure 3.851 motion for post-conviction relief and denied his accompanying petition for a writ of habeas corpus. *Bradley*, 33 So. 3d at 667. Petitioner's Rule 3.851 motion argued, among other things, that Florida's capital sentencing scheme was unconstitutional under *Apprendi* and *Ring*. *Id.* at 670 n.6.

Petitioner sought a federal writ of habeas corpus under 28 U.S.C. § 2254, which was denied by the United States District Court for the Middle District of Florida in 2014. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 3:10-cv-1078, ECF No. 15 (M.D. Fla. Mar. 12, 2014). The United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 14-11630 (11th Cir. Sept. 12, 2014).

ARGUMENT

I. Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*

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

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

and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[2] Each of those determinations are "elements" that must be found by a jury unanimously and beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst*, 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 cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

[2] This unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death may be imposed only upon unanimous jury verdicts.

Petitioner's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered a non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation. However, the record is clear that Petitioner's jurors were *not* unanimous as to whether the death penalty should even be recommended to the court.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments.

II. The *Hurst* decisions should apply retroactively to Petitioner under Florida's *Witt* retroactivity doctrine because his sentence became final after *Apprendi* was decided

The *Hurst* decisions should apply retroactively to Petitioner under the Florida retroactivity doctrine established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and this Court's post-*Hurst* retroactivity decisions. Petitioner's death sentence became final on November 26, 2001, after *Apprendi* was decided.

Under *Witt*, this Court applies changes in the law retroactively where those changes (1) emanate from either this Court or the United States Supreme Court; (2) are constitutional in nature; and (3) constitute developments of fundamental significance. *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015). For purposes of the third *Witt* prong, this Court decides whether developments in the law are of "fundamental significance" by analyzing three factors—purpose, reliance, and administration of justice—which *Witt* borrowed from the decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Falcon*, 162 So. 3d at 961.

This Court has already made clear that under a *Witt* analysis the *Hurst* decisions apply retroactively to all death sentences that became final after the 2002 decision in *Ring*. *See. e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has not yet squarely addressed *Hurst* retroactivity with respect to the small number of death sentences that became final during the two-year gap between *Apprendi* and *Ring*. This petition provides the Court with the opportunity to close the *Apprendi* gap by holding that the same *Hurst* retroactivity this Court has extended to post-*Ring* sentences should also extend to post-*Apprendi* sentences. *Apprendi* is the indispensable constitutional foundation for *Ring* and for the *Hurst* decisions, and extending *Hurst* retroactivity to post-*Apprendi* sentences satisfies all three prongs of a *Witt* analysis.

A. If Florida is to maintain a bright-line retroactivity rule for *Hurst* claims, the line should be drawn at *Apprendi* rather than *Ring* because both *Ring* and *Hurst* were extensions of *Apprendi*

If there is to be a bright-line retroactivity rule for *Hurst* claims, that line should be drawn at *Apprendi*, not *Ring*: *Ring* and *Hurst* both are merely extensions of the rule originally announced in *Apprendi*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the United States Supreme Court stated in *Hurst*, the *Ring* Court *applied Apprendi*'s *analysis* to conclude that Mr. Ring's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. Then, just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst v. Florida* applied *Apprendi*'s principles to Florida's capital sentencing scheme.

In *Hurst*, the Supreme Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was merely an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—the *Hurst* Court stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s similar overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639

(1990)—which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holding derived directly from *Apprendi*.

This Court has also consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived directly from *Apprendi*. Even in *Mosley v. State*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*."). And this was not a new observation: over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. For example, in *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005), the Court explained: "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was 'an evolutionary refinement in capital jurisprudence,' in that "[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*."

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the United States Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).

This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: that the United States Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So. 2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the United States Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the United States Supreme Court and citing *Mills*), *and King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same). In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would be arbitrary and fundamentally unfair to extend *Hurst* retroactivity to fourteen years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*.[3]

[3] The arbitrariness is particularly stark when we compare individual cases. For example, during the period between *Apprendi* and *Ring*, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, finding that *Hurst* was retroactive because his sentence became final after *Ring*. *See Card v. Jones*, SC17-453, 2017 WL 1743835 (Fla. May 4, 2017). However, Mr. Bowles, whose case was decided on direct appeal on the same day, might not obtain review under *Hurst* notwithstanding the post-*Apprendi* posture of his case.

B. Extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* and before *Ring* is supported by the three *Witt* factors

For the very same reasons this Court described in *Mosley v. State* with respect to post-*Ring* death sentences, extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* is also proper under the *Witt* doctrine. As noted above, retroactivity under *Witt* requires analysis of three prongs, all of which are satisfied with respect to post-*Apprendi* death sentences.

In both *Mosley* and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court observed that there is no dispute that *Hurst* claims satisfy the first two *Witt* retroactivity prongs because they (1) arise from decisions of this Court and the United States Supreme Court, and (2) are constitutional in nature. However, with respect to the third *Witt* prong—whether the *Hurst* decisions are of "fundamental significance," as measured by the three *Stovall*/*Linkletter* factors (purpose, reliance, and administration of justice)—*Mosley* and *Asay* held that retroactivity analysis depends on the date an individual's death sentence became final on direct appeal. In *Mosley*, the Court analyzed the third *Witt* prong in light of a death sentence that became final after both *Apprendi* and *Ring*, and concluded that the *Hurst* decisions applied retroactively. In *Asay*, the Court analyzed the third *Witt* prong in light of a death sentence that became final before both *Apprendi* and *Ring*, and concluded that *Hurst v. Florida* did not apply retroactively.

This Court has not yet published an opinion specifically analyzing the third *Witt* prong in the context of a death sentence, like Petitioner's, that became final between *Apprendi* and *Ring*. As applied to Petitioner's post-*Apprendi* sentence, the *Hurst* decisions are of "fundamental significance" within the meaning of the third *Witt* prong and the three *Stovall*/*Linkletter* factors. All three *Stovall*/*Linkletter* factors favor retroactivity.

1. Purpose of new rule

As applied to Petitioner's post-*Apprendi* death sentence, the first *Stovall*/*Linkletter* factor—the purpose of *Hurst v. Florida* and *Hurst v. State*—weighs at least "in favor" of retroactivity, if not "heavily in favor." In *Asay*, which analyzed only *Hurst v. Florida*, this Court stated that the purpose of the United States Supreme Court's Sixth Amendment decision "is to ensure that a criminal defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury." *Asay*, 210 So. 3d at 17. In *Mosley*, where this Court considered both *Hurst v. Florida* and the decision on remand in *Hurst v. State*, the Court added that the purpose of *Hurst v. State* was to enshrine Florida's "longstanding history requiring unanimous jury verdicts as to the elements of a crime" into the state's capital sentencing scheme. *Mosley*, 209 So. 3d at 1278. With those principles in mind, the *Asay* Court ruled in the context of a death sentence that became final nearly

a decade before both *Ring* and *Apprendi* that the purpose of *Hurst v. Florida* weighs "in favor" of retroactive application. *Asay*, 210 So. 3d at 18. In *Mosley*, in the context of a death sentence that became final after *Ring*, this Court concluded that the combined purpose of *Hurst v. Florida* and *Hurst v. State* weighed "heavily in favor" of retroactive application. *Mosley*, 209 So. 3d at 1248.

Here, under the reasoning of both *Mosley* and *Asay*, Petitioner's post-*Apprendi* death sentence weighs at least in favor of retroactive application, if not heavily in favor, given the closeness of his sentence's finality to the date *Ring* was decided. As this Court emphasized in *Asay*, the right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 210 So. 3d at 18 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life"). Or as the Court further noted in *Mosley*, there is a "critical importance of a unanimous jury verdict within Florida's independent constitutional right to a trial by jury." *Mosley*, 209 So. 3d at 1278. Given those critical features of the *Hurst* decisions, this Court should find that Petitioner's post-*Apprendi* sentence satisfies the "purpose" factor.

2. Extent of reliance on old rule

As applied to Petitioner's post-*Apprendi* death sentence, the second *Stovall*/*Linkletter* factor—the extent of reliance on Florida's unconstitutional pre-*Hurst* scheme—also weighs in favor of applying those decisions retroactively. This factor focuses on reliance on the idea that *Apprendi* did not apply to Florida's capital sentencing scheme. After *Apprendi*, Florida could no longer rely on the soundness of pre-*Apprendi* law, namely *Spaziano* and *Hildwin*, as that law was "irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623. As this Court explained in *Mosley*, the question is not whether Florida relied upon pre-*Apprendi* in good faith, but how *Hurst* and its antecedents changed the calculus of the constitutionality of Florida's capital sentencing scheme. *See Mosley*, 209 So. 3d at 1280. Thus, because *Apprendi* changed the calculus of Florida's capital scheme, this factor weighs in favor of applying retroactivity to post-*Apprendi* petitioners.

This Court concluded in *Asay* that reliance on the old rule weighed against retroactivity for a pre-*Apprendi* and pre-*Ring* petitioner because Florida had relied on the old rule for decades and 400 death row inmates had been sentenced under that rule. *Asay*, 210 So. 3d at 20. The Court reasoned that as of 1991 (a decade before *Apprendi*) "this Court and the State of Florida had every reason to believe that its

capital sentencing scheme was constitutionally sound." *Asay*, 210 So. 3d at 19.[4] *But the same is not true after Apprendi*.

The reliance factor therefore applies in a substantially different way for a prisoner whose sentence became final after *Apprendi*. Indeed, in his *Apprendi* concurrence, Justice Thomas plainly informed everyone that schemes like Florida's were on constitutionally uncertain ground and that the Supreme Court would be directly addressing those death penalty schemes in another case. *See Apprendi*, 530 U.S. at 523 (Thomas, J., concurring). From the day the opinion in *Apprendi* was issued, America's few judge-sentencing capital schemes (such as Florida's) were on a collision course with the Sixth Amendment.

Indeed, this Court's own decisions shifted after *Apprendi*, highlighting that the reliance factor favors retroactive application of the *Hurst* decisions to Petitioner. To be sure, it was after *Apprendi* that Justices of this Court recognized the shift and began acting on the basis of that recognition. For example, this Court began monitoring post-*Apprendi* appeals of death row inmates in other states. *See Mills*, 786 So. 2d at 537 (describing a Delaware petitioner's unsuccessful attempt to bring an *Apprendi* claim). And even more: in *Mills*, this Court rejected the application of

[4] Perhaps because of its context (review of a death sentence finalized in 1991), *Asay* did not discuss *Mills v. Moore*, the case where this Court, pre-*Ring*, considered the constitutionality of Florida's scheme on the basis of a challenge made under *Apprendi*.

Apprendi because it was not the job of the Florida Supreme Court to anticipate future United States Supreme Court action. *Id*. at 537. Instead of citing a single Florida case, this Court said it didn't have the "authority" to overrule the United States Supreme Court's decision in *Walton*, which was not a Florida case. *Id*. Thus, during this post-*Apprendi* period, Florida was not operating on the same ground on which Florida operated before *Apprendi* was decided. And this Court explicitly recognized this difference in *Johnson* when it noted that *Ring* was "not a sudden or unforeseeable development," but rather a "refinement" of *Apprendi*. 904 So. 2d at 405 (quoting *Monlyn v. State*, 894 So. 2d 832, 841 (Fla. 2004) (Pariente, C.J., specially concurring)).

Apprendi changed the calculus of the constitutionality of Florida's capital sentencing scheme, and the reliance factor weighs in favor of extending retroactivity to Petitioner, whose case became final after *Apprendi*. While the Court accurately noted in *Mosley* that Florida's prior capital sentencing scheme has been unconstitutional since *Ring*, it is equally true that Florida's scheme has been unconstitutional since *Apprendi*. And it is worth repeating here that both *Ring* and *Hurst* were applications of the Sixth Amendment rule originally announced in *Apprendi*. It was *Apprendi* that first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See* 530 U.S. at

490. The *Hurst* Court acknowledged that the *Ring* Court had applied *Apprendi*'s analysis to conclude that the petitioner's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. *Hurst* repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. And this Court most recently acknowledged in *Mosley* itself that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*.").

3. Effect on administration of justice

As applied to Petitioner's post-*Apprendi* death sentence, the third *Stovall*/*Linkletter* factor— the effect on the administration of justice—also favors applying those decisions retroactively. Under *Asay*, this factor will 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 1281-83.

Because this Court has already ruled that the third *Stovall*/*Linkletter* factor weighs in favor of applying *Hurst* retroactively to all post-*Ring* death sentences, the

question is whether also applying *Hurst* retroactively to death sentences that became final in the two-year period between *Apprendi* and *Ring* would tip the balance to "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).

There are only 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver (the total number of cases, including unanimous jury-vote cases and waiver cases, is 30). This is not an unworkable number of prisoners but, instead, a small, definite group. Petitioner urges that this Court apply its post-*Hurst* jurisprudence to his post-*Apprendi* case and vacate his unconstitutional death sentence.

III. The *Hurst* decisions should be applied retroactively to Petitioner under federal law

Even if the *Hurst* decisions did not apply retroactively to Petitioner's "post-*Apprendi*" death sentence under Florida's *Witt* retroactivity analysis, 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 Petitioner and other similarly situated prisoners without regard to when their death sentences became final on direct appeal. The concept of "partial retroactivity," whereby a 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 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule).

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. 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." *Hurst v. State*, 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*, 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."). Indeed, federal judges in Florida have already recognized the impact of the beyond-a-reasonable-doubt standard on the federal 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 as a matter of federal law 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 constitutional rule articulated in *Johnson v. United States*, 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 constitutional 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 factfinding 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 factfinding 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 constitutional rule was announced, violates the United States 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, for purposes of federal law, Petitioner's right to *Hurst* retroactivity should not be impacted by the date his death 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 Petitioner 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* as well as post-*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 addition, making *Hurst* only partially retroactive to post-*Ring* sentences would unfairly deny *Hurst* access to defendants, like Petitioner, who were sentenced between the decisions in *Apprendi* and *Ring.* The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*, and that it was *Apprendi* that required the Court to overrule its previous decision in *Walton* upholding Arizona's capital sentencing scheme. *See Ring*, 536 U.S. at 588-89. As for Florida, in *Hurst*, the Supreme Court

repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621.

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.

And 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. In Florida today, even "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson*, 205 So. 3d at 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 2017 WL 1743835, at *1 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a second successive 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).

The determination about the validity of a death sentence should not turn on such "arbitrary and capricious" factors. This Court should reject the idea of partial retroactivity under principles of federal law.

IV. The *Hurst* error in Petitioner's case is not harmless under this Court's decisions in light of the non-unanimous jury recommendation

The *Hurst* error in Petitioner's case is not harmless beyond a reasonable doubt under this Court's decisions because his advisory jury recommended the death

penalty by a non-unanimous vote of 10-2. As the Court held in *Dubose v. State*, "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of the applicable aggravating and mitigating circumstances. 210 So. 3d 641, 657 (Fla. 2017).

The Court has *never* found a *Hurst* error harmless in a case where the jury vote was not unanimous, and has now granted relief in dozens of non-unanimous-recommendation cases. *See, e.g. Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth*, 209 So. 3d. at 1163-65 (11-1 jury vote); *Hernandez v. Jones*, SC17-440, No. 2017 WL 1954985, at *1 (11-1 jury vote); *Card*, 2017 WL 1743835, at *1 (11-1 jury vote); *Braddy v. State*, No. SC15-404, 2017 WL 2590802, at *1 (Fla. June 15, 2017) (11-1 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (11-1 and 9-3 jury votes); *Durousseau v. State*, No. SC15-1276, 2017 WL 411331, at *5-6 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (10-2 jury vote); *Hodges v. State*, 213 So. 3d 863, 881 (Fla. 2017) (10-2 jury vote); *Hertz v. State*, No. SC17-456, 2017 WL 2210402 at *3 (10-2 jury vote); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3 jury votes); *Ault v. State*, 213 So. 3d 670, 679 (Fla. 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017) (9-3 jury vote); *Williams v. State*, 209 So. 3d 543, 565-67 (Fla.

2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (8-4 jury vote); *Mosley*, 209 So. 3d. at 1283 (8-4 jury vote); *Dubose*, 210 So. 3d. at 657 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4 jury vote); *Caylor v. State*, Nos. SC15-1823, SC16-399, 2017 WL 2210386, at *7 (8-4 jury vote); *Hall v. State*, No. SC14-2225, 2017 WL 2590704, at *1 (Fla. June 15, 2017) (8-4 jury vote); *Calloway*, 210 So. 3d at 1200 (7-5 jury vote); *Hurst v. State*, 202 So. 3d. at 69 (7-5 jury vote).

The *Dubose* holding that *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of this Court's analysis in *Hurst v. State*. Under *Hurst v. State*, this Court emphasized that Florida's courts may not speculate that, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. As this Court cautioned, engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So. 3d at 69; *see also Mosley*, 209 So. 3d. at 1284. The reasoning the Court applied in *Hurst v. State* applies here.

> 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, 202 So. 3d at 68.

Even if precedent allowed courts to find *Hurst* errors harmless in cases with non-unanimous jury recommendations, the State still could not show that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt.

First, there is no reason to believe that a juror who voted to recommend a life sentence would vote to impose the death penalty in a hypothetical post-*Hurst* proceeding. On the contrary, it is more likely that *fewer* jurors would have made the required fact-finding to impose the death penalty had they known their verdict was binding because jurors evaluate evidence in a different way when they know they are required to conduct the fact-finding instead of simply providing a recommendation to a judge who will make the actual decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing significant negative impact of a jury's belief that ultimate responsibility for determining whether defendant will be sentenced to death lies elsewhere); *see also id.* at 341 (explaining that the Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility.").

Second, mitigation is an important consideration in assessing harmless error. *See Hurst*, 202 So. 3d at 68-69 ("[W]e cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently

substantial' to call for a life sentence."). The trial judge found mitigating circumstances. It cannot be convincingly demonstrated that jurors would find this mitigating evidence insignificant in a post-*Hurst* sentencing decision.

Third, if Petitioner's counsel's thinking had not been influenced by an unconstitutional statute, Petitioner and counsel could have pursued a different approach than the one taken in the advisory jury/judge-sentencing-scheme, including a different approach to jury selection, broader challenges to aggravation, and a broader presentation of mitigation. As such, it cannot be concluded that a jury unanimously would find the same specific aggravators as the judge or unanimously reject mitigators in a post-*Hurst* 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 the jury's vote relative to mitigating evidence).

Fourth, to the extent the State may argue that the *Hurst* error is rendered harmless by the fact that the aggravators applied to Petitioner included aggravators based on contemporaneous and/or prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin*, 209 So. 3d. at 1248 (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*, 209 So. 3d. at 1150 (contemporaneous felony); *Mosley*, 209 So. 3d. at 1256 (contemporaneous felony); *Armstrong*, 211 So. 3d. 864-65 (prior violent felony); *Calloway*, 210 So. 3d. at 1176 (prior violent felony); *Durousseau*, 2017 WL 411331, at *6 (prior violent felony); *Simmons*, 207 So. 3d at 861 (prior violent felony); *Williams*, 209 So. 3d. at 554 (prior violent and contemporaneous felonies). The same reasoning applies here.

Accordingly, the *Hurst* errors were not harmless based on the jury's non-unanimous recommendation and the other factors described above, and a re-sentencing is appropriate. If there is any doubt as to whether the *Hurst* errors in Petitioner's case were harmless, such doubts should be resolved after a remand for an evidentiary proceeding, at which Petitioner can develop evidence regarding the impact of the errors on defense counsel's overall strategy, challenges to the aggravation, and presentation of mitigation.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

Robert R. Berry
Assistant Collateral Regional
Counsel-North
175 Salem Court
Tallahassee, FL 32301
robert.berry@ccrc-north.org
(850) 487-0927
Florida Bar No. 714216

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017, the foregoing was served via the e-portal to the Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, and Assistant Collateral Regional Counsel Robert Berry at robert.berry@ccrc-north.org.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Billy H. Nolas
Billy H. Nolas