IN THE SUPREME COURT OF THE STATE OF FLORIDA

APPELLATE CASE NO: 17-1458

LOWER COURT CASE NUMBER: **01-CF-00-8692A**

WILLIAM KENNETH TAYLOR,
Defendant/Appellant,

-vs-

STATE OF FLORIDA,
Plaintiff/Appellee.

APPELLANT'S INITIAL BRIEF

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SUMMARY OF THE ARGUMENT

The Trial Court erred in denying the Appellant's Successor 3.851 Motion for Post-Conviction Relief. Although the court considered itself bound by this Court's decision in *Davis v. State* and successive decisions wherein this Court has denied *Hurst* relief in matters where the jury's recommendation was unanimous, the trial court could have found admitted and considered the testimony of Dr. Harvey Moore and his group. Dr. Moore opined that the sociological effect of instructing the jury on well over a hundred occasions that their role was simply advisory or their decision merely a recommendation eliminated any sense of moral responsibility in the minds of the juror and accordingly, any reliability in the nature or make up of their recommendation.

The trial court erred in reducing Dr. Moore's testimony to a matter of counting and simple mathematics by assuming that the court was equally competent to determine the number of occasions in which the jury was so instructed . Dr. Moore's testimony was significant and, in fact, critical not because of his group's capacity to identify the offending instructions but in his ability to describe the effect of those instructions on the jury's capacity and/or willingness to reliably consider the import of their "recommendation." Thus the trial court erred in refusing to admit and consider Dr. Moore's testimony. Had the trial court adequately considered the testimony it would necessarily determined that a

Caldwell v. Mississippi error had occurred and granted the Appellant a new penalty phase.

The Appellant also asserts that despite this Honorable Court's decisions in *Davis* and similar decisions, that the *Hurst* error can never be harmless, regardless of the jury recommendation.

ARGUMENT

1. The Appellant is entitled to post-conviction relief pursuant to *Hurst v. Florida.* The Appellant was sentenced to death without the benefit of a jury finding beyond a reasonable doubt that the State of Florida had established the necessary aggravating factors necessary to support a death sentence. The Trial Court erred in failing to Order a new penalty phase for the Appellant. The *Hurst* error was not harmless in light of the United States Supreme Court's rulings related to the Sixth and Eighth Amendments to the United States Constitution and in particular, it's ruling in *Caldwell v. Mississippi.* The trial court erred in refusing to admit or consider expert testimony describing the sociological effect of repeatedly describing the jury's role as "advisory" or "a recommendation." The effect of the repeated instruction negated any imprimatur of reliability despite an unanimous jury recommendation.

Mr. Taylor was charged by indictment with first-degree murder of Sandra Kushmer. He was also indicted on charges of attempted first-degree murder of William Maddox, one count of robbery with a deadly weapon, one count of robbery with a firearm, and one count of armed burglary of a dwelling. Mr. Taylor was convicted of the first-degree murder and other counts. The advisory panel recommended death by a unanimous 12 - 0. The advisory panel's recommendation contained no verdict or fact-finding.

The Trial Court imposed a death sentence. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury. The trial court found that the State had proven the existence of three statutory aggravators; (1) the murder was committed while Taylor was on probation; (2) Taylor had previously been convicted of a

felony involving a threat of violence to the person; and, (3) the murder was committed for pecuniary gain. Each statutory aggravator was assigned great weight. The trial court did not find any statutory mitigating factors but found thirteen (13) non-statutory mitigating factors. The trial court concluded that the aggravating factors.

This Honorable Court affirmed the death sentences on appeal. *Taylor v. State*, 937 So.2d 590 (Fla. 2006). Mr. Taylor sought post-conviction relief under Florida Rule of Criminal Procedure 3.851. The post-conviction court denied relief. Mr. Taylor appealed to the Florida Supreme Court and concurrently filed a state petition for writ of habeas corpus. This Court affirmed the denial of post-conviction relief and denied state habeas relief. *Taylor v. State*, 46 So. 3d 535 (Fla. 2010).

Mr. Taylor sought relief in United States District Court by filing a Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254. On March 19, 2014. The United States District Court appointed undersigned counsel to present arguments that the Petitioner's federal habeas petition is entitled to equitable tolling. The District Court has not ruled on the petition and has stayed the proceeding.

On January 9, 2017, pursuant to Fla.R.Crim.Pro. 3.851, Mr. Taylor filed a Successor Motion to Vacate his sentences arguing reversible error as described in *Hurst v. Florida,* 136 S. Ct. 616 (2016). The Motion also argued that despite an

unanimous jury recommendation, the error could not be harmless pursuant to *Caldwell v. Mississippi.* The Motion was Denied and the Defendant/Appellant timely filed his Notice of Appeal. On appeal, the Appellant would argue that the Order Denying Post-Conviction Relief was error and, further, that the trial court's refusal to admit and consider the testimony of Dr. Harvey Moore in support of the *Caldwell* error constitutes reversible error.

Hurst v. Florida, 136 S. Ct. 616 (2016) is a landmark decision issued by the United States Supreme Court that declared Florida's death penalty system unconstitutional. Based on *Hurst,* other case law, and the implications arising therefrom, Mr. Taylor's death sentence violates the United States Constitution and the Florida Constitution. This Court should reverse the trial court's denial of relief and remand the matter for a new penalty phase.

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

> extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the

> great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

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

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

Id. 498, 2367.

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

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

Hurst, 136 S.Ct. at 621. (Internal quotes omitted). The Court applied *Ring* directly

to Florida's death penalty system and found:

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

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

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

Mr. Taylor raised the issue of the unconstitutionality of Florida's death penalty scheme based upon *Ring*, during his direct appeal. Mr. Taylor's death sentence was imposed after *Ring*, contrary to *Ring*, and despite *Ring*. Mr. Taylor's direct appeal arguments, however, did not have the clear statement to and specific application to Florida of *Hurst* when he raised the unconstitutionality of his death sentence.

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

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

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

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

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id***.** at 239–40, 2727. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909 (1976);*Proffitt v. Florida*, 428 U.S. 242 (1976), *et al*. *Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. at 188, 96 S. Ct. at 2932.

The Supreme Court has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, “one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.” *Id.* at 181–82, 2929, citing *Witherspoon v. Illinois*,

391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved. *Id*. citing *Furman v. Georgia*, 408 U.S., at 439-440, 92 S.Ct., at 2828-2829 (Powell, J., dissenting). Mr. Taylor had no jury and thus death sentence had none of the Eighth Amendment reliability of a jury verdict.

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

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

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

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

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

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

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

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

Id. at 341, 2646. Any reliance or argument based on the advisory recommendation in Mr. Taylor's case is misplaced and fails to rise to the level of constitutional

equivalence based on *Caldwell*. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

In this matter, the trial court was afforded the basis for finding that the jury recommendation was inherently unreliable due to the role they were assigned. Dr. Moore presented testimony in a companion case and the parties agreed to accept his testimony as it would necessarily have applied to Mr. Taylor. In the matter of *Perry Taylor v. State of Florida,* Case No. 88-15525, Dr. Moore identified over 180 instances where the jury had been advised that their role was "advisory" or that their decision was "a recommendation." Dr. Moore is undeniably qualified to analyze information and opine on its effect on a group of individuals, or otherwise stated, it's effect from a sociological perspective. He received his bachelor's degree from Knox College in Galesburg, Illinois in 1968; a master's degree in social psychology from Illinois State University in 1969 and a Ph.D. in sociology from Case Western Reserve University in 1972. Besides attaining the rank of Captain in the U.S. Army Signal Corps, he was an associate professor at the University of South Florida and rose to become Director of USF's Human Resources Institute, a multidisciplinary institute in applied sociology and applied psychology. He also served as Chief of Staff to the University President and Deputy Director for the Florida Mental Health Institute. (ROA P183-185)

Dr. Moore described the methodological technique of content analysis, the mechanism he utilized in evaluating the reliability of the jury recommendation on behalf of Perry Taylor and would have provided on behalf of William Taylor, had his testimony been deemed admissible. In his testimony on behalf of Perry Taylor he describes the importance of the concept or technique of repetition. He describes the process a basic tool for teaching a task, whether it be arithmetic or golf. (ROA P186-189) Dr. Moore, who has prepared text script for voir dire in over 1400 trials further described the importance of repetition in attempting to effectively communicate concepts to jurors. When applied to jury instructions, Dr. Moore opined that the instructions become the basic structure for understanding the law to jurors. Dr. Moore testified that in addition to repetition, the concept of recency and primacy also effect the way an individual enhances the impact of that which is being taught. Individuals tends to retain what is heard first and last. (ROA P 195)

It was apparent that Dr. Moore concluded that in an instance when the jury is told 180 times that their role is advisory with the majority of those instructions occurring at the beginning of the trial during the voir dire and then in the trial court's final instructions to the jury, content analysis tends to demonstrate the effect of the now erroneous instructions on the jury's singular and collective thought processes. That effect was to instill in their consciousness the diminished role they would take in deciding whether to recommend life or death. Had Dr.

Moore been allowed to testify, he would have demonstrated that from a social science perspective, the erroneous instructions to the jury could and, likely would, cause the jury to relinquish responsibility on the most significant decision they would make. It is even more likely that a single or small minority of the jury relinquished their responsibility inasmuch as they were made to understand that in the end, the trial judge was responsible for making the "right" decision. The import of this analysis and conclusion is extraordinary in light of the impact a single juror's recommendation has on the application of *Hurst* in the instant matter.

The trial court recognized the legitimacy of Content Analysis in the field of social science but denied his testimony on the grounds that it failed the second prong of the *Frye* test because the Petitioner failed to establish it had been "used as a means to investigate a trial for biased language or undue prejudice. The trial court erroneously concluded that the province of jury deliberation falls outside of the construct of established social science research. It should be noted that as counsel for the Petitioner was attempting to describe the application of Content Analysis to a juror's perception of the import of their recommendation, the court repeatedly sustained the State's objections on the grounds of relevance. However, in the Order Granting the State's Motion to Strike Defendant's Witness/Exhibit List and Attachments, the court demonstrates its belief that Dr. Moore's testimony is nothing more than lay speculation. "The court finds that even if Dr. Moore's

testimony and methods could meet required standards, his testimony its still inadmissible as it enters into the purview of the Court's decision making ability…It does not provide any additional knowledge or ability that the Court does not also possess." In essence, the Court is saying, "I can count, too." That understanding entirely misses the importance of Dr. Moore's work. (ROA P244-246)

The overarching question courts, legislatures and society must ask, particularly in light of *Hurst,* is "what constitutes reliability in a acknowledgedly flawed process?" Dr. Moore through his decades of research, study, lecturing and application of Content Analysis provides a distinct and critical lesson. The process was flawed not only procedurally but also substantively when analyzed from a sociological perspective. Such a contention was deemed by the trial court as a "layperson's" subjective conclusion but, in fact, this Court's assessment (and the trial court's reliance) on the belief that a unanimous jury recommendation is reliable constitutes the greater leap of faith. We can conclude that a non-unanimous jury fails to pass constitutional muster, however, we cannot, absent the application of proper rules and instructions, truly know whether the jurors "recognize[s] the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility." *Caldwell.* Dr. Moore attempted to establish that potentiality and the trial court erred in failing to recognize its import.

The Supreme Court has also limited the death penalty under the Eighth

Amendment based on evolving standards of decency.

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam); Robinson v. California,* 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in *Atkins,* the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " 536 U.S., at 311, 122 S.Ct. 2242 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles,* 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

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

On remand in *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. In addition to Florida's jury trial right, this Court found that the Eighth Amendment's evolving standards of decency required a unanimous jury fact finding.

> [T]he foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders.

Hurst v. State, No. SC12-1947, 2016 WL 6036978, at *10-18 (Fla. Oct. 14, 2016). In *Hurst v. Florida*, -- So. 3d --, 2016 WL 6036978 (Fla. October 14, 2016), although the Court did not address the issue of retroactivity, in vacating Mr. Hurst's death sentence, it did cite to 8th Amendment concerns given the State of Florida's unconstitutional death penalty scheme: "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst, Id.* at 15.

This Court actually went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure

that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency. (internal citations omitted)." *Hurst, Id.* at 16.

Mr. Taylor was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

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

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

protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).

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

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams v. United States,* 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). See *Adams v. Illinois*, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); *Roberts v. Russell*, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968).
>
> Winship expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S.Ct., at 1072.
>
> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and Winship is thus to be given complete retroactive effect.

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

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

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

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the

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

Hurst v. State, No. SC12-1947, 2016 WL 6036978, at *2 (Fla. Oct. 14, 2016). In *Perry v. State*, --So.3d - - 2016 WL 6036982 (Fla. 2016). This Court has indeed found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional and found:

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

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

Thus, the new statute was unconstitutional. The increase in penalty imposed on Mr. Taylor was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." *Id*. Lastly, there was no "unanimity in the final jury recommendation for death." *Id.*

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

CONCLUSION

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

incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility clearly lies with a jury and a unanimous recommendation by an advisory panel is not the same as a jury's verdict. It lacks the foundation of a jury with a proper understanding of both the law and their obligations. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Taylor was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Taylor's death sentence violates the Sixth, Eighth and Fourteenth Amendments. The trial court erred in denying the Appellant's Motion for Post-Conviction Relief and also erred in refusing to admit the testimony of Dr. Moore. This court should reverse the trial court's Order Denying Relief and remand the matter for a new penalty phase or, in the alternative, for an evidentiary hearing that allows the Appellant to present the testimony of Dr. Moore in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to all counsel of record and the assigned judge on September 20, 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font and size in this Appellant's Initial Brief is Times New Roman, 14 point, in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

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