IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-445

JAMES E. HITCHCOCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Hitchcock lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Hitchcock.

PRELIMINARY STATEMENT REGARDING REFERENCES

The postconviction record on appeal of the denial of Mr. Hitchcock's Successive Motion to Vacate Death Sentence is comprised of one volume, initially compiled by the clerk, successively paginated beginning with page one. References to the record include volume and page number and are of the form, e.g., (R. 123).

Mr. Hitchcock had one guilt phase trial and four penalty phases. Following this Court's affirmance of his last death sentence, Mr. Hitchcock filed a Motion under Florida Rule of Criminal Procedure 3.851. After the trial court denied relief, this Court remanded for a decision on the merits of Mr. Hitchcock's guilt phase issues. To the extent that any citations to the record are made from Mr. Hitchcock's prior trial, penalty phases or postconviction hearings, the citations will be explained herein.

Generally, James Hitchcock is referred to as Mr. Hitchcock

throughout this brief. The Office of the Capital Collateral Regional Counsel - Middle Region, representing the Appellant, is shortened to “CCRC.”

STATEMENT OF THE CASE AND FACTS

1. Procedural History

In 1976 Mr. Hitchcock was arrested and indicted for first-degree murder. Mr. Hitchcock was tried, convicted and sentenced to death in 1977. This Court affirmed. *Hitchcock v. State*, 413 So.2d 741 (Fla.1982), *cert. denied*, 459 U.S. 960 (1982).

Mr. Hitchcock sought state postconviction relief. The postconviction court denied relief. This Court affirmed the denial. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983).

Following postconviction, Mr. Hitchcock first sought federal habeas relief in the United States District Court, Middle District of Florida. The court dismissed the petition. Mr. Hitchcock appealed the denial of federal habeas corpus relief. The Eleventh Circuit Court of Appeals affirmed the district court's decision and denied relief *en banc* and rehearing. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985); *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985). The United States Supreme Court granted certiorari and reversed on penalty phase. *Hitchcock v. Wainwright*, 476 U.S.1168, 106 S.Ct. 2888 (1986); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821 (1987).

After resentencing proceedings, Mr. Hitchcock was again sentenced to death. This Court affirmed the trial court. *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990). The United States Supreme

Court denied certiorari, *Hitchcock v. Florida*, 502 U.S. 912, 112 S. Ct. 311 (1991), but later granted rehearing and granted penalty phase relief, *Hitchcock v. Florida*, 505 U.S. 1215, 112 S. Ct. 3020 (1992). This Court reversed on remand. *Hitchcock v. State*, 614 So.2d 483 (Fla. 1993).

After a third resentencing, Mr. Hitchcock was sentenced to death. This Court, however, reversed the trial court and remanded the case for a new sentencing. *Hitchcock v. State*, 673 So.2d 859(Fla. 1993). After a fourth sentencing, Mr. Hitchcock was again sentenced to death. The resentencing court found four aggravating circumstances:

> 1) Mr. Hitchcock was under sentence of imprisonment, in that he was on parole for burglary, at the time of the murder (moderate weight); 2) he committed the murder while engaged in the offense of sexual battery (great weight); 3) the murder was committed to avoid or prevent lawful arrest (great weight); and 4) was especially heinous, atrocious, or cruel (considerable weight).

1997 Penalty Phase Record 1112-14.

In mitigation, the resentencing court gave some weight to Mr. Hitchcock's age (20). R 1114. The court listed three groupings of non-statutory mitigation:

> 1) Aspects of the crime (Mr. Hitchcock was under the influence of alcohol and marijuana at the time of the crime; life-long personality difficulties influenced him at the time of the crime; the murder was the result of an unplanned impulsive act; he was not armed before the altercation; he surrendered and cooperated with authorities; and he voluntarily confessed) ,each of which received very little weight;

> 2) Mr. Hitchcock's background (he grew up in extreme rural poverty; he experienced the lingering death of his father at a young age; he witnessed his mother's epileptic seizures; he dropped out of school and was unable to pursue a formal education; he witnessed and experienced emotional and physical abuse; he had a borderline personality disorder; he left home at an early age to escape the circumstances he was in; he worked hard in several demanding jobs to support himself and his family; he risked his life to save his uncle from drowning), each receiving some weight;
>
> 3) Positive character traits (self-education and education of others; acted as a mediator or peacemaker perhaps saving a corrections officer and another inmate from death or serious injury; he improved his character defects; he has been thoughtful and caring to his mother and other family members; artistic talent; steps toward self improvement; good conduct in court; love and support of family members), each receiving some weight.

The court refused to consider evidence of plea negotiations with the state. 1997 Record on Appeal 1115-17 (Amended Sentencing Order)

Mr. Hitchcock appealed his death sentence and this Court affirmed the resentencing court. *Hitchcock v. State*, 755 So.2d 638 (Fla. 2000), *cert. denied*, 531 U.S. 1040; 121 S. Ct. 633 (2000).

Mr. Hitchcock sought postconviction relief in State court. Mr. Hitchcock's initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend was dismissed by the postconviction court, as was an amended motion. Mr. Hitchcock also filed a Motion for DNA testing which was denied. *Hitchcock v. State*, 866 So.2d 23 (Fla. 2004).

Mr. Hitchcock filed a Second Amended Motion to Vacate Judgment

of Conviction and Sentence with Special Request for Leave to Amend. The postconviction court granted Mr. Hitchcock's Motion to Amend Section D and his Motion to Amend Section E. The postconviction court granted a hearing on all claims for which Mr. Hitchcock requested a hearing. After an evidentiary hearing, the postconviction court entered a written order denying each claim of the motion.

After the postconviction court denied relief on Mr. Hitchcock's postconviction motion, he appealed to this Court. With his initial brief, Mr. Hitchcock filed a Petition for Writ of Habeas Corpus invoking this Court's original jurisdiction. Following oral argument, this Court relinquished jurisdiction to the postconviction court for a decision of the merits of Mr. Hitchcock's guilt phase postconviction claims. The postconviction court held additional evidentiary hearings on these claims. Following the hearing, the postconviction court denied relief and Mr. Hitchcock appealed the denial to this Court. Following supplemental briefing and oral argument, this Court denied the habeas petition and affirmed the postconviction court's denial of relief. *Hitchcock v. State*, 991 So.2d 337 (Fla. 2008).

Mr. Hitchcock filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court, Middle District of Florida and filed an Amended Petition for Writ of Habeas Corpus. The district court denied Mr. Hitchcock's Amended

Petition for a Writ of Habeas Corpus.

On March 12, 2014, the United States Circuit Court for the Eleventh Circuit affirmed the district court's denial of habeas corpus relief. *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014). The United States Supreme Court denied certiorari. *Hitchcock v. Crews*, 135 S. Ct. 366, reh'g denied, 135 S. Ct. 779 (2014)

At issue in this appeal is the death sentence that became final after the United States Supreme Court's denial of certiorari. *Hitchcock v. State*, 755 So.2d 638 (Fla. 2000), *cert. denied*, 531 U.S. 1040; 121 S. Ct. 633 (2000).

2. Prior Ring Claims

Relevant to this appeal, Mr. Hitchcock raised a claim under *Ring v. Arizona,* 536 U.S. 584,122 S.Ct. 2428 (2002), by amending his postconviction motion. The postconviction court denied relief and this Court affirmed. This Court stated:

> On appeal, Hitchcock acknowledges that this Court has denied relief on similar claims and states that he raises the claim only to preserve the issue for federal review. We write only to clarify that Hitchcock is not entitled to relief on this claim because this Court has held that *Ring* does not apply retroactively. *Johnson v. State,* 904 So.2d 400, 409 (Fla.2005). To the extent, that Hitchcock relies on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his argument is also without merit. This Court has consistently held that *Apprendi* does not require that aggravating circumstances be charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict. *Porter v. Crosby,* 840 So.2d 981, 986 (Fla.2003); *Brown v. Moore,* 800 So.2d 223, 224-25 (Fla.2001).

Hitchcock v. State, 991 So. 2d 337, 362–63 (Fla. 2008). Mr. Hitchcock also raised *Ring* and *Ring* related claims in his State Petition for Habeas Corpus. The Court denied relief stating:

> Hitchcock argues, based on *Ring* and *Apprendi*, that he was unconstitutionally deprived of notice that he could be convicted under a theory of felony murder and that he was unconstitutionally deprived of a unanimous verdict identifying whether the jury found him guilty of felony murder or premeditated murder. He also argues that his appellate counsel was ineffective for not raising this issue on direct appeal. This Court rejected virtually identical arguments in *Mansfield v. State*, 911 So.2d 1160, 1178-79 (Fla.2005). Accordingly, Hitchcock's claim is likewise without merit.
>
> Next, we address Hitchcock's habeas claim that Florida's death penalty scheme is unconstitutional as applied to him under *Ring* and *Apprendi* and that his appellate counsel was ineffective for not raising on direct appeal the issue of *Apprendi*'s impact on Florida's capital sentencing scheme. As discussed above, this Court has held that Florida's capital sentencing scheme is not unconstitutional. As for Hitchcock's corresponding ineffective assistance of counsel claim, neither Ring nor *Apprendi* had been decided when the appeal of Hitchcock's latest resentencing was pending before this Court. *Hitchcock VI*, 755 So.2d at 640, reh'g denied, No. SC92717 (Fla. May 3, 2000) (unpublished order). Counsel cannot be expected to anticipate changes in the law. *Walton v. State*, 847 So.2d 438, 445 (Fla.2003). Hitchcock's argument is without merit.

Id. at 363.

3. Prior *Caldwell* Issues

Mr. Hitchcock raised as CLAIM VIII of his prior postconviction motion the issue that:

> MR. HITCHCOCK'S RESENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S

> SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.
>
> This Claim was based on the trial court instructing the jury:
>
> As you have been told, **your final decision as to what punishment shall be imposed is the responsibility of me as the judge.** However, it is your duty and responsibility to follow the law that I will now give you to render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of death penalty and what is sufficient mitigating circumstances exist to outweigh any aggravating circumstances you may find to exist.

(1996 VOL. VII R. 363)(Emphasis added).

The postconviction court denied relief. Mr. Hitchcock also raised a claim based on this error in his state habeas petition. On appeal from the denial of postconviction relief, this Court found that just the *Caldwell* claim was "procedurally barred." The Court went on to hold:

> We further hold that resentencing counsel was not ineffective for not objecting to the trial court's jury instruction regarding the jury's recommendation. Upon reviewing the instruction given, we find that it does not materially differ from Florida's standard jury instruction, which "fully advises the jury of the importance of its role, correctly states the law, and does not denigrate the role of the jury." *Brown v. State*, 721 So.2d 274, 283 (Fla.1998) (citations omitted); *see also Card v. State*, 803 So.2d 613, 628 & n. 14 (Fla.2001); *Combs v. State*, 525 So.2d 853, 855-58 (Fla.1988) (holding that the characterization of jury's role as advisory in the standard jury instructions does not violate *Caldwell*). The instruction given in this case sufficiently instructed the jury of its responsibility and important role in the sentencing process and therefore did not violate Caldwell. Counsel cannot be deemed ineffective for failing to make a

> meritless objection. *See Melendez v. State*, 612 So.2d 1366, 1369 (Fla.1992).

Hitchcock at 991 So. 2d 361.

The Court also denied relief on the habeas issue. Mr. Hitchcock sought relief in federal court on these issues and was denied a writ of habeas corpus.

4. Successive Postconviction Motion

Following the United States Supreme Court's decision in *Hurst v. Florida*, Mr. Hitchcock filed a successive motion for postconviction relief. The State filed a response and the trial court then held a Case Management Conference.

The trial court denied Mr. Hitchcock's motion. The court recognized that Mr. Hitchcock raised issues that arose as implications from *Hurst v. Florida*. (R. 223). These claims were based on not just the Sixth Amendment but also the Eighth Amendment and the Florida Constitution. *See* (R. 223).

The trial court found itself constrained by this Court's prior decisions:

> In *Asay v State*, --- So.3d --- , 2016 WL 7406538 (Fla. Dec, 22, 2016(, the Florida Supreme Court ruled that the right to a jury's determination of each element of an offense is of the utmost importance. *Id*. at *9. Therefore, when considering retroactivity, the Florida Supreme Court looked at the purpose of the new rule, the reliance on the old rule, and the effect on the administration of justice. Under this analysis, it determined that *Hurst* would not apply retroactively to defendants who received the death sentence before the finding in Ring. Id at *13. The Florida Supreme Court determined that Florida's capital sentencing statute has

> been unconstitutional only since the issuance of *Ring*, and therefore, *Hurst* should be retroactive from the date of the Ring opinion, but no earlier. *Mosley v. State*, --So.3d ---. 2016 WL 7406506 (Fla. Dec. 22, 2016).A Motion for rehearing was recently denied. *Mosley v. State*, SC14-436, 2017 WL 510491 (Fla. Feb. 8, 2017).

(R. 223)(footnote omitted).

SUMMARY OF ARGUMENT

Florida has never had a constitutional system for capital punishment. Four times the State has sought a death sentence for James Hitchcock; not once has the State complied with the United States Constitution and Florida Constitution in obtaining Mr. Hitchcock's death sentence.

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. Hitchcock's death sentence violates the United States Constitution and the Florida Constitution. This Court should vacate Mr. Hitchcock's death sentence.

Hurst v. Florida and this Court's subsequent decisions were not available for Mr. Hitchcock to present the claims he raised in the successive postconviction motion at issue. *Hurst* gave the expanded claims contained in the motion viability. Mr. Hitchcock submits that the decisions in *Hurst v. Florida* and the decisions that followed are changes in the law, clarification of existing

law, and newly discovered evidence in the sense that *Hurst* overcame prior unconstitutional decisions that prevented a remedy for all of the constitutional violations that occurred in Mr. Hitchcock's case. Mr. Hitchcock asserts unequivocally that these decisions should be retroactive and that any decision to the contrary violates his rights. Moreover, any distinction based on finality, see *Asay v. State*, 210 So.3d 1 (Fla. 2016), is arbitrary and capricious, violating the Eighth Amendment and violating the Equal Protection Clause and Due Process Clause of the United States and Florida Constitutions.

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from taking responsibility. For years, Florida told the advisory panel, incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, this Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized

society. Mr. Hitchcock was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Hitchcock's death sentence violates the Sixth, Eighth and Fourteenth Amendments and the Florida Constitution. This Court should vacate his death sentence.

STANDARD OF REVIEW

The lower court summarily denied Mr. Hitchcock's motion without conducting an evidentiary hearing. Mr. Hitchcock's factual assertions should be accepted as true and the review of this Court should be *de novo*. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THE ERROR IN MR. HITCHCOCK'S CASE WAS NOT HARMLESS

To the extent that harmless error analysis is permissible to apply to one or more of Mr. Hitchcock's claims, any error in Mr. Hitchcock's case was not harmless. Since this Court's opinion in *Hurst v. State*, the Court has repeatedly held that the *Hurst* error was not harmless in cases involving less than unanimous advisory panel recommendations.

Mr. Hitchcock's advisory panel recommended death by a 10-2 margin. While this does not suffice to meet *Hurst v. Florida*'s jury requirement or *Hurst v. State*'s unanimity requirement, it does counter any attempt by the State to show that the Sixth Amendment violations in this case are harmless - - beyond a

reasonable doubt. Removed from the constitutional responsibility that subjected a fellow citizen to death, the advisory panel still returned a recommendation that would have required a life sentence if the advisory panel were a jury acting under a constitutional system.

Moreover, Mr. Hitchcock's case, as seen at trial and in postconviction was highly mitigated. At the time of offense, Mr. Hitchcock was a mere 20 years-of-age. The trial and postconviction evidence showed that he suffered from organic brain damage, severe trauma and deprivation. Upon review of the mitigation, Mr. Hitchcock's case is clearly one of the most mitigated, even with the aggravation present in his case.

Four different Florida Supreme Court Justices have dissented from the affirmance of Mr. Hitchcock's death sentence in different opinions. When Mr. Hitchcock's case was reviewed by this Court for the first time in 1982, two Justices found death disproportionate. *Hitchcock v. State*, 413 So.2d 741, 748 (Fla. 1982) (McDonald, joined by Overton, dissenting). In 1982, the dissenting Justices said:

> In this case, there was testimony that from childhood Hitchcock's mind had not been entirely normal. Prior to commission of this crime Hitchcock had been drinking heavily and smoking marijuana. Returning from his 'night on the town,' he entered the bedroom of the thirteen year old victim and engaged in sex with her. When she announced that she had been hurt and was going to tell her mother he reacted impulsively. From the record I can discern no basis for the jury or the trial judge's

> failure to find that the defendant committed this crime while under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Certainly his actions fall far short of showing a reasoned planning or reasoned knowledge of what he was doing when he strangled the victim.

Id. at 748. Concurring in the 1983 denial of post-conviction relief, the two Justices expressed a "continuing belief that the death penalty is not appropriate for Hitchcock." *Hitchcock v. State*, 432 So. 2d 42, 44 (Fla. 1983) (McDonald and Overton, concurring). After the second penalty phase at which the state presented the essentially the same aggravating evidence as at the first, two different members of the court, Justices Kogan and Barkett, would have reduced the sentence to life on proportionality grounds; Justice Shaw dissented for unstated reasons. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1991), *vacated*, *Hitchcock v. Florida*, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992).

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

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis

> of all the evidence so that there is a 'total picture' of the case.

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

Any attempt by the State to argue that the constitutional violations argued herein were harmless beyond a reasonable doubt fails. This Court has repeatedly held that non-unanimous death recommendations render the Sixth Amendment error of *Hurst* not harmless when the cases became final after *Ring. See, e.g.*, *Johnson v. State,* 205 So. 3d 1285, 1288 (Fla. 2016) (11-1 jury vote); *McGirth v. State,* 209 So. 3d 1146, 1150 (Fla. 2017) (11-1 jury vote); *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, 569 (Fla. 2017) (10-2 jury vote); *Hodges v. State,* 213 So.3d 863(Fla. 2017) (10-2 jury vote); *Smith v. State,* 213 So.3d 722 (Fla. 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1245 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, No. SC13-5, 2017 WL 410215, at *2 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4 jury vote); *Mosley*,

209 So.3d at 1284 (8-4 jury vote); *Dubose v. State,* 2017 WL 526506, at *11 (8-4 jury vote); *Anderson v. State*, Nos. SC12-1252, SC14-881 2017 WL 930924, at *12 (Fla. Dec. 1, 2016) (8-4 jury vote); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (Fla. Mar. 9, 2017) (9-3 and 11-1 jury votes); *Ault* v. *State*, 213 So.3d 670 (Fla. 2017) (9-3 and 10-2 jury votes); *Jackson v. State,* 432 So.3d 754(Fla. 2017) (11-1 jury vote); *Baker v. State*, Nos. SC13-2331, SC14-873, 2017 WL 1090559 at *2 (Fla. Mar. 23, 2017) (9-3 jury vote); *Deviney v. State*, No. SC15-1903, 2017 WL 1090560 at *1 (Fla. Mar. 23, 2017) (8-4 jury vote); *Orme v. State*, Nos. SC13-819 & SC14-22, 2017 WL 1177611, at *1 (Fla. Mar. 30, 2017) (11-1 jury vote); *Bradley v. State*, No. SC14-1412, 2017 WL 1177618, at *2 (Fla. Mar. 30, 2017) (10-2 jury vote); *White v. State*, No. SC15-625, 2017 WL 1177640, at *1 (Fla. Mar. 30, 2017) (11-1 jury vote); *Guzman v. State*, No. SC13-1002, 2017 WL 1282099, at *1 (Fla. Apr. 6, 2017) (7-5 jury vote); *Abdool v. State*, Nos. SC14-582 & SC14-2039, 2017 WL 1282105, at *8 (Fla. Apr. 6, 2017) (10-2 jury vote); *Newberry v. State*, No. SC14-703, 2017 WL 1282108, at *4-5 (Fla. Apr. 6, 2017) (8-4 jury vote); *Heyne v. State*, No. SC14-1800, 2017 WL 1282104, at *5 (Fla. Apr. 6, 2017) (10-2 jury vote); *Robards v. State*, No. SC15-1364, 2017 WL 1282109, at *5 (Fla. Apr. 6, 2017) (7-5 jury vote); *McMillian v. State*, No. SC14-1796, 2017 WL 1366120, at *11 (Fla.

Apr. 13, 2017) (10-2 jury vote); *Brookins v. State*, No. SC14-418, 2017 WL 1409664, at *7 (Fla. Apr. 20, 2017) (10-2 jury vote); *Banks v. Jones*, Nos. SC15-297, SC15-297 2017 WL 1409666, at *9 (Fla. Apr. 20, 2017) (10-2 jury vote).

The error in this case was not harmless.

ARGUMENT II

TO THE EXTENT THAT RETROACTIVE APPLICATION IS NECESSARY, THIS COURT SHOULD FIND THAT *HURST V. FLORIDA* AND *HURST V. STATE* ARE RETROACTIVE TO ALL OF MR. HITCHCOCK'S CLAIMS BECAUSE DENYING MR. HITCHCOCK RELIEF BASED ON NON-RETROACTIVITY VIOLATES MR. HITCHCOCK'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Hurst and Hurst v. State should be retroactive on all cases. If the rights at issue are important enough to apply to some cases retroactively, they are important enough to apply to all cases retroactively. This Court has found *Hurst* retroactive to the date that *Ring* was issued and non-retroactive to the cases that came before. This left behind numerous individuals such as Mr. Hitchcock whose cases became final before *Ring*. The parsing of relief based on the date of *Ring* was not based on the strength of the evidence favoring death, the lack of mitigation supporting life, or on any meaningful criteria. This has rendered the death sentences that remain unconstitutional. This Court should find that *Hurst* and the claims that developed based on *Hurst* and pleaded in Mr. Hitchcock's

motion are not barred by non-retroactivity.

There are federal and state law standards for determining whether a new rule applies retroactively. Mr. Hitchcock argues each in turn on the issues that this Court has found non-retroactivity and on the issues which this Court has not yet determined retroactivity. It is also argued that retroactivity does not apply to his Eighth Amendment claims because the state is never allowed to carry out arbitrary and capricious punishment or cruel and unusual punishment. Finally, as far as Mr. Hitchcock has previously raised *Caldwell* and *Ring* claims, he argues in this section generally and specifically under the distinct arguments below, that the law of the case should not apply.

1. Mr. Hitchcock Is Entitled To Retroactive Application Under Federal Law.

Whether a new rule of law is applied retroactively is determined first under the federal standard. The Supreme Court recently explained that under the federal standard:

> The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. See *Chaidez v. United States,* 568 U.S. ––––, ––––, n. 16, 133 S.Ct. 1103, 1113,

> n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota,* 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague*, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana*, 577 U.S. ––––, ––––, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); Teague, supra, at 307, 311, 109 S.Ct. 1060. Second, new " 'watershed rules of criminal procedure,' " which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); see Teague, supra, at 311–313, 109 S.Ct. 1060.

Welch v. United States, 136 S. Ct. 1257, 1264, 194 L. Ed. 2d 387 (2016).

The federal test, however, does not prohibit a state from granting greater retroactivity to its own cases. *Danforth v. Minnesota*, 552 U.S. 264, 277, 282, 128 S.Ct. 1029, 1039, 1042 (2008) Florida traditionally has done so. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (holding that *Hitchcock* claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So. 2d 713 n.1 (Fla. 1991) ("Because this petition was filed prior to our disposition of *Hall* . . . we will allow the instant claim to be raised in a petition for a writ of habeas corpus."). Florida's test from *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980) is distinct

from the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *See Falcon v. State*, 162 So. 3d 954, 956 n.1 (Fla. 2015) (recognizing that determining retroactivity under *Witt* and *Teague* requires separate inquiries).

A state is not free to deny retroactive application of a new law that should be found retroactive under the federal standard of retroactivity. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 725, 193 L. Ed. 2d 599 (2016), the state courts denied relief under *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) based on a finding of non-retroactivity under state law. *Montgomery,* at 727. On certiorari review, the United States Supreme Court considered whether *Miller* adopted a new substantive rule that applies retroactively on collateral review and whether the state court could refuse to give retroactive effect to the *Miller* decision. *Id*. The Court reversed the state denial based on retroactivity grounds because:

> Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates,* 484 U.S., at 218, 108 S.Ct. 534. 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.

Id. at 731–32. Accordingly, based on *Montgomery*, a state court may not constitutionally refuse to give retroactive effect to a substantive constitutional right. While *Danforth* allows a state court to extend more retroactivity than federal constitutional law requires, a state may not refuse to apply new law retroactively when the new law meets the requirements for retroactive application.

Welch considered retroactive application of the constitutional rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The United States Supreme Court held in *Johnson* that a sentencing increase under federal sentencing was void-for-vagueness. *Id*. at 2556. In *Welch*, the Court found *Johnson* retroactive because it "affected the reach of the underlying statute rather that the judicial procedures by which the statute is applied." *Welch*, 136 S.Ct. at 1265. The Court explained:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id*., at 351–352, 124 S.Ct. 2519 (citation omitted); *see* Montgomery, supra, at ––––, 136 S.Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid*. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone

> convicted with use of the invalidated procedure might have been acquitted otherwise." *Id*., at 352, 124 S.Ct. 2519.

Welch v. United States, 136 S. Ct. 1257, 1264–65 (2016).

The Court went on to hold that the rule announced in *Johnson* was substantive. *Id.* The Court explained:

> By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." *Schriro, supra,* at 353, 124 S.Ct. 2519. Before *Johnson,* the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *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.
>
> *Johnson* establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. *United States v. United States Coin & Currency,* 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). It follows that *Johnson* is a substantive decision.

Welch at 1265.

Hurst v. State and *Hurst v. Florida* announced substantive rules that apply retroactively under federal retroactivity standards. While the central holding of *Ring* was certainly applicable to Florida, *Hurst v. State* and *Hurst v. Florida* went beyond *Ring* in scope as Florida's death penalty system differed from the Arizona system at issue in Ring. *Hurst v. Florida* and *Hurst v. State* demand that a jury find each element beyond a

reasonable doubt. This Court also found that jury unanimity is required to narrow the class of individuals subjected to the death penalty to those "convicted of the most aggravated and the least mitigated of murders." *Hurst v. State* at 202 So.3d at 50. These decisions place murders without a jury trial on the elements that subject an individual to death beyond the State's power to punish by death.

The new rule based on the old right to a jury trial of *Hurst v. Florida* was more than procedural because of the nature of Florida's death penalty system. While the United States Supreme 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)(*see Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519 (2004)) the Arizona system of *Ring* was different than Florida's death penalty statute and system at issue in *Hurst v. Florida* and *Hurst v. State*. Florida's death penalty system required not just fact-finding on whether aggravating factors existed, but whether the aggravating factors were sufficient and able to overcome the mitigating factors, and whether death should be imposed. *Hurst v. Florida* corrected the unconstitutionality of the judge solely making those decisions, but all of those decisions were substantive. Depending on what the judge decided, and now post-*Hurst v. Florida*, the jury's decision, determines whether an individual is sentenced to the greater penalty of death or the

lesser penalty of life.

Mr. Hitchcock raised in his successive motion that he was entitled to relief because he was denied the right to the state proving each element beyond a reasonable doubt. While this is a freestanding basis for relief, it is also definitive proof that the change in the law in *Hurst v. Florida* and *Hurst v. State* were substantive. *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 Ivan V. v. City of N.Y.*, 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952, (1972).; *see also 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."). Moreover, with *Hurst v. Florida and Hurst v. State*, 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.

Under federal retroactivity, there is no partial retroactivity. The obvious reason for this is that it would violate due process and equal protection. Changes in the law are either retroactive of not. Under this Court's duty to apply substantive

law retroactively, *Hurst v. Florida* and *Hurst v. State* should apply retroactively to Mr. Hitchcock.

2. Mr. Hitchcock is entitled to retroactive application under State Law

Under Florida retroactivity law, non-retroactivity should not bar relief for Mr. Hitchcock. The Court's splintered opinions following *Hurst v. Florida* should be reconsidered to the extent that they deny relief to Mr. Hitchcock based on retroactivity based on the date that *Ring* became final. Moreover, the splitting of retroactivity of *Hurst* based on *Ring* has imparted further unconstitutionality in Mr. Hitchcock's case and Florida's death penalty system and should be remedied.

In *Mosley v. State,* 209 So. 3d 1248, 1275 (Fla. 2016), *reh'g denied,* No. SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017), the majority found that *Hurst* and *Hurst v. State* applied retroactively to cases which became final after *Ring v. Arizona* was issued. The majority analyzed retroactivity under the fundamental fairness approach of *James v. State*, 615 So.2d 668 (Fla. 1993) and the approach of *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980).

The majority found that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under the fundamental fairness approach of *James* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn . . .." *Id.* at 1275. While this decision was correct, and

fair, it was not based on anything about the nature of the crime or Mr. Mosley's mitigation. Certainly, relief was appropriate, but the majority's basing the decision on the finality date of Mr. Mosley's case had no relation to the actual wrongfulness of the constitutional violations it remedied, the nature of Mr. Mosley's case or the actual functioning of Florida's death penalty scheme.

The majority also found *Hurst v. Florida and Hurst v. State* retroactive to Mr. Mosley's case under the *Witt* standard. *Id.* at 1276. The *Witt* standard grants retroactive application of changes if,

> ". . .the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. Determining the retroactivity of a holding "requir[es] that [this Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." Id. at 924–25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. See *id*. at 925.

Id. The majority decided that the first two prongs were met because *Hurst v. State* and *Hurst v. Florida* emanated from the United States Supreme and this Court and were constitutional in nature. *Id.* The third prong required the majority to decide whether the change in the law was a development of fundamental significance. As the majority explained,

> To be a "development of fundamental significance," the

> change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. We conclude that *Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from Stovall14 and Linkletter, which we address below. *Id.*
>
> The three-fold test of *Stovall* and *Linkletter* requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So.2d at 926; *Johnson*, 904 So.2d at 408.

Id. at 1276–77.

The majority found the threefold test of *Stovall* and *Linkletter* was met. *Id*. at 1277. The majority declared that the purpose of the new rule announced in *Hurst v. Florida* is,

> to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I, section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. *See Hurst*, 202 So.3d at 57.

Id. The majority concluded,

> Thus, because *Hurst v. Florida* held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and Hurst further emphasized the critical importance of a unanimous verdict within Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of

> these holdings weighs heavily in favor of retroactive application.

Id. at 1278. The majority found that, as far as post-*Ring* cases were concerned, "fairness strongly favors applying *Hurst* retroactively to" the time that *Ring* was issued. *Id.* at 1280. The majority found that, "From *Hurst* [v. State], it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*. *Id*. at 1280

Lastly, the majority found that the effect on the administration of justice would not be so great as to deny retroactive application to the post-*Ring* cases. *Id.* at 1281. The majority considered that:

> Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So.2d at 929–30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements," the former being those that justify retroactive application and the latter being those that do not.

Id. at 1281–82. The Court found that it did not so burden the administration of justice because, capital punishment "connotes special concern for individual fairness because of the possible

imposition of a penalty as unredeeming as death." *Witt*, 387 So.2d at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990)." *Id*. at 1282.

This was a fair and just decision. The right to a jury trial under the United States Constitution and the Florida Constitution is a basic and fundamental right that has been at the core of the rights that human dignity and justice require. Mr. Mosley will now receive a fair jury trial where the ultimate question of whether he lives or dies will be determined by fact-finding made by representatives of the community in the form of a jury. The exact same reasoning should apply to Mr. Hitchcock's case and allow his claims to be heard on the merits.

The Court considered retroactivity of what appears to be just *Hurst v. Florida* for *pre-Ring* cases in *Asay v. State,* 210 So.3d 1, 15 (Fla. 2016), *reh'g denied*, No. SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017). The majority found that *Hurst v. Florida* did not apply retroactively to allow relief for Mr. Asay under the Sixth Amendment.

The majority opinion mentions this Court's *Hurst* decision "[o]n remand from the United States Supreme Court," holding "'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.' *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016)[and]"that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id*." *Asay* at 11. The majority went on to characterize Asay's claim as asking for "retroactive application of *Hurst v. Florida*." *Id*. There is no further mention of this Court's post-remand *Hurst* decision in the majority opinion and whether the more extensive findings of this Court in *Hurst v. State* gave Mr. Asay more extensive alternatives for relief that were not barred by non-retroactivity.

In *Asay*, the majority went on to hold:

> After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

Id. at 22. The majority found that the first prong of the *Stovall/Linkletter* test, the "purpose of the new rule" weighed in Mr. Asay's favor. The majority discussed that the importance of the right to a jury trial under the United States and Florida Constitutions has lead "this Court has taken care to ensure all necessary constitutional protections are in place before one

forfeits his or her life[ ].” *Id.* at 18. The majority found that the reliance on the old rule weighed “against retroactive application of *Hurst v. Florida*” to Mr. Asay’s pre-*Ring* case. *Id*. at 19. The majority found this Court had previously relied upon Supreme Court precedent and the breadth of the Court’s prior reliance.

Lastly, the majority considered the “Effect on the Administration of Justice.” The majority recognized that this Court’s prior analysis of the retroactivity of *Ring* under the first prong of *Witt* “was impacted by an incorrect understanding of the Sixth Amendment claim . . ..” The majority found that the Court’s conclusion in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) that “to apply *Ring* retroactively in Florida would . . .’would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings’” was correct. *Id*. at 22; *citing Johnson* at 412.

Respectfully, the majority reached the wrong conclusion in finding that the reliance and the effect on the administration of justice weighed against retroactive application of *Hurst v. Florida*. The constitutionality of Florida’s death penalty scheme was previously upheld and it took until 2016 for the United States State’s Supreme Court to remedy what was obvious in 2002 when *Ring* issued.

Reliance on the old rule must account for Florida’s

unwillingness to change the statute that denied the right to a jury trial on the elements necessary for a death sentence. The legislature never had any of the limits that the Florida and federal courts had when considering the application of *Ring*. This Court went so far as to request a change in Florida's death penalty system following *Ring*, only to be met with legislative obstinacy. *See State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005) (asking "that in light of developments in other states and at the federal level, the Legislature [to] revisit the statute to require some unanimity in the jury's recommendations). Whereas many states followed *Ring* and changed their statutes, Florida did not, something that this Court told them to do.

The effect on the administration of justice based on full retroactivity would not place any more burden on the system overall. As we have seen in practice, the prosecutors are considering whether it is even necessary to seek death. The State and the trial courts have been more than capable of handling the cases in which relief has been granted on *Hurst* so far. Overall, the impact on the system pales in comparison to the importance of the rights at issue post-*Hurst* and the importance of those rights in determining the most aggravated and least mitigated. If Florida is to have a death penalty, full retroactivity allows Florida to move forward with full confidence that no individual is executed undeservedly or in violation of the law.

Justice Pariente's opinion, concurring in part and dissenting in part, recognized that the retroactivity of *Hurst v. State* also needed to be decided in favor of full retroactivity. *Id*. at 32. (Pariente, J., concurring in part and dissenting in part). As Justice Pariente described the issue:

> Our recent decision in *Hurst* is undoubtedly a decision of fundamental constitutional significance based not only on the United States Supreme Court's decision in *Hurst v. Florida*, but also on Florida's separate constitutional right to trial by jury under article I, section 22, of the Florida Constitution. Not only did the United States Supreme Court hold that Florida's capital sentencing scheme was unconstitutional based on the Sixth Amendment to the United States Constitution, but this Court also held in Hurst that capital defendants are entitled to unanimous jury findings of each aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances and a unanimous jury recommendation of death as part of Florida's constitutional right to a trial by jury under article I, section 22, of the Florida Constitution. Hurst, 202 So.3d at 44.

Id. (Footnotes omitted). Justice Pariente concluded:

> Applying decisions of fundamental constitutional significance retroactively to defendants in similar circumstances is essential to "ensuring fairness and uniformity in individual adjudications." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). This Court has always recognized that "death is different," so we must be extraordinarily vigilant in ensuring that the death penalty is not arbitrarily imposed. Therefore, I dissent from the majority's holding not to apply *Hurst* retroactively to all death sentences that were imposed under Florida's unconstitutional capital sentencing scheme.

Id. (Footnotes omitted).

In *Gaskin v. State*, the Court decided retroactivity with no *Hurst* issues before it. Mr. Gaskin did not have a motion raising

the *Hurst* and *Hurst* related claims. Nevertheless, simply relying on *Asay* the majority found:

> Finally, Gaskin's argues that he is entitled to relief in light of *Hurst v. Florida*. Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under *Hurst v. Florida*. *See Asay v. State*, ---So.3d ---, ----, 2016 WL 7406538 at *13 (Fla. 2016) (holding that *Hurst* is not retroactive to cases that became final before the United States Supreme Court decided Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Accordingly, we affirm the circuit court's order summarily denying Gaskin's successive postconviction motion.

Gaskin v. State, No. SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19, 2017).

Justice Pariente again determined that *Hurst v. State* and *Hurst v. Florida* should be retroactive "to all death sentences imposed under Florida's prior, unconstitutional capital sentencing scheme." *Id*. at *2; *Asay v. State*, 210 So.3d 1(Fla. 2016) (Pariente, J., concurring in part and dissenting in part); see *Hurst v. Florida*, 136 S. Ct. at 622 (holding Florida's capital sentencing scheme unconstitutional). Justice Perry dissented on the *Hurst* issue based on his dissent in part in *Asay*. *Id*. at *5. Justice Lewis dissented without an opinion.

Justice Pariente's dissenting opinion in *Gaskin* also found that *Hurst* should apply to Mr. Gaskin's case because, "the record on appeal reveals that Gaskin argued that 'section 921.141 . . . was unconstitutional on its face' for the reasons espoused by the United States Supreme Court in *Ring* and *Hurst v. Florida* and then

further explained by this Court in *Hurst* []". *Id*. at 6-7. Justice Pariente took great care to show exactly how Mr. Gaskin had raised the issues that would form the basis of the Court's opinion in *Ring*, *Hurst v. Florida* and ultimately this Court's decision *Hurst v. State*.

Justice Pariente's opinion was correct. While it is argued here that it is unconstitutional and unfair to allow the death sentences of the pre-*Ring* cases stand, the unfairness and unconstitutionality of the majority's pre- and post-*Ring* split only serves as aggravation. Florida now has a death penalty system where individuals are sentenced to death not because they have the most aggravated and least mitigated case, but because their case became final before *Ring*. This does not even take into account the date of offense; an individual's case can become final after a retrial many years after the date of offense that occurred well before *Ring*.

Under the *Witt* or *James* approach, both *Hurst* and *Hurst v. State* should apply retroactively to allow a decision on the merits of Mr. Hitchcock's claims. Mr. Hitchcock raised a *Ring* claim collaterally in his postconviction motion and his habeas petition to this Court. Much like the post-*Ring* appellant or the pre-*Ring* appellant with the fore-thinking attorney to raise the issues underlying *Ring*, Mr. Hitchcock raised a claim based on *Apprendi* in postconviction and amended the claim as soon as *Ring* was issued.

There was no meaningful difference between Mr. Hitchcock being denied a remedy and those who were fortunate enough to have an attorney to raise the underlying *Ring* issues on direct appeal. At every opportunity that Mr. Hitchcock has had, he has asserted his rights and his right to a remedy. The motion at issue in this appeal is no different. Fundamental fairness requires that this Court allow a remedy for all of the denials of Mr. Hitchcock's rights.

Under the Florida standard of *Witt*, retroactivity should also not be a bar to relief. The exact same reasoning that allowed a remedy for Mr. Mosley applies to the pre-*Ring* claims based on *Hurst v. State* and *Hurst v. Florida*, and the claims that have yet to be decided but became viable after those decisions. Moreover, to the extent that Mr. Hitchcock has raised claims involving the Eighth Amendment, an Eighth Amendment violation can never stand regardless of retroactivity. The State is never allowed to carry out arbitrary and capricious punishment or that which is contrary to evolving standards of decency.

When the lower court denied Mr. Hitchcock's successive claims, this Court had yet to, and still has not, decided the constitutional claims that Mr. Hitchcock raised in his motion in postconviction and, accordingly, has not decided whether non-retroactivity prevented relief for the violations. While this Court applied *Hurst v. Florida* and *Hurst v. State* retroactively in

Mosley, the majority only considered *Hurst v. Florida* in deciding retroactivity in *Asay*. This Court needs to determine the retroactivity of the claims beyond the simple Sixth Amendment component of *Hurst v. Florida*, the claims that this Court recognized in its own opinion in *Hurst v. State*, and the issues that have arisen based on the effects of both decisions. The United States Supreme Court left a number of decisions for this Court to answer following the high court's decision in *Hurst v. Florida*. Indeed, these decisions were properly left to this Court as an initial matter because this Court is most able to consider the actual functioning of Florida's death penalty system throughout its history. Moreover, state law and the Florida Constitution greatly increase the effects from *Hurst v. Florida* and its continued application.

There was no material difference between Mr. Mosley's case and those of Mr. Asay and Mr. Gaskin. There is no material difference in this case. Under Florida law, *Hurst v. Florida* and *Hurst v. State* should apply retroactively to Mr. Hitchcock and all of his claims should be determined on the merits.

3. Law of the Case

Even if the Court does not find *Hurst* retroactive to Mr. Hitchcock's case, the law of the case is overcome because having raised these claims, adhering to the law of the case would result

in a manifest injustice. This Court explained in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So.2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick,* 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State,* 444 So.2d 939 (Fla.1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner, 452 So.2d at 552; Strazzulla,* 177 So.2d at 4.

Id. at 720. On a very basic level, the denial of relief based on *Hurst* and *Ring* when Mr. Hitchcock raised a *Ring* claim as soon as he could, is fundamentally unfair and a manifest injustice.

Mr. Hitchcock raised *Ring* claims and an aggravated *Caldwell* claim in the postconviction motion and habeas petition following his last sentence of death. While all of his claims should be reviewed now in the context of Florida's constitutional death penalty scheme, his prior *Ring* and *Caldwell* claims are worthy of the utmost judicial scrutiny. If relief is not available for Mr. Hitchcock under *Hurst v. Florida* and *Hurst v. State*, the law of

the case should be overcome to allow consideration of Mr. Hitchcock's *Ring* and *Caldwell* claims.

The majority decision in *Mosley* found that "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002 . . .." *Mosley* at 1275. Respectfully, it is submitted that it has been unconstitutional for much longer and may never have been constitutional ever. While *Apprendi*, *Ring* and *Hurst* were a step forward in recognizing the extent of the right to a jury trial, those rights have long existed in this State and this Nation. This Court should grant relief.

ARGUMENT III

MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST,* PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. HITCHCOCK WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.

Mr. Hitchcock was denied his right to a jury trial on the facts that subjected him to the death penalty. Half a jury trial is a full denial of the right to a jury trial that has been essential to a fair system of justice that respects the dignity of the individual. This Court should grant relief.

The United States Supreme Court issued *Apprendi* and *Ring*. In *Apprendi*, the Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The Court recognized that the principles supporting a jury trial,

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

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

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

Id. 498, 2367.

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

> "'the required finding of an aggravated circumstance

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

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

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

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

The findings of fact statutorily required to render a defendant death-eligible are elements of the offense that separate

first-degree murder from capital murder under Florida law, and form part of the definition of the crime of capital murder. Mr. Hitchcock's death sentence was obtained under the exact death penalty scheme found unconstitutional in *Hurst v. Florida*. Mr. Hitchcock's death sentence, imposed without the proper jury fact-finding, violates the Sixth Amendment under *Ring* and *Hurst*.

Without regard to any issues of retroactivity possible or application of harmless error, Mr. Hitchcock 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. Hitchcock a jury trial on the essential elements necessary for a death sentence, this Court should vacate Mr. Hitchcock's death sentence.

ARGUMENT IV

THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST* AND SUBSEQUENT CASES, MR. HITCHCOCK'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.

Mr. Hitchcock remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar. For now on, individuals facing a death sentence will have the protection of a jury. Individuals for no other reason than their case became final after *Ring* was issued will receive new trials that follow the

constitutional requirements of *Hurst v. Florida* and *Hurst v. State*. They will receive an actual sworn jury fully and constitutionally instructed instructed on the jury's role as the ultimate decision maker. The State will also have the burden of proving each aggravating factor and that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.

"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. Hitchcock had no jury, thus his 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 *2*06, 2940–41. Mr. Hitchcock, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentence

in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Mr. Hitchcock'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. Hitchcock's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell*. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

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

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is

> applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam); Robinson v. California,* 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in *Atkins,* the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " 536 U.S., at 311, 122 S.Ct. 2242 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles,* 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560–61, 125 S. Ct. 1183, 1190 (2005). Florida has been an outlier, for a very long time. The United States Supreme Court in *Hurst* 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. Hitchcock 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. This Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The Court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that

the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

This Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted). *Hurst v. State,* at 60. The standards of decency have evolved such that Mr. Hitchcock cannot be sentenced to death without a jury unanimously finding all of the facts necessary to subject him to death.

Mr. Hitchcock 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. It is even more arbitrary and capricious when it

is considered that a post-*Ring* defendant with the same advisory panel recommendation will receive relief and the full measure of constitutional protection at any subsequent retrial. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell*. A mere recommendation of 10-2 would be inadequate under the *Hurst v. State*. To subject Mr. Hitchcock to the death penalty based on Florida's previous unconstitutional system when a non-unanimous jury advisory recommendation would today violate the United States and/or the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. Hitchcock may not be subject to the death penalty. Mr. Hitchcock was sentenced to death without the reliability of jury fact-finding and unanimity that the Eight Amendment guarantees. His death sentence violates the Eighth and Fourteenth Amendments because it is contrary to evolving standards of decency and because his case is not the most aggravated and least mitigated when it is considered that the post-*Ring* cases will have a unanimous determination that such is true. This Court should vacate his death

sentence.

ARGUMENT V

THIS COURT SHOULD VACATE MR. HITCHCOCK'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. HITCHCOCK TO THE DEATH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).

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

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams v. United States,* 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). See *Adams v. Illinois*, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202

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

Ivan V. v. City of N.Y., 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952, (1972). In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), the Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or 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).

Hurst v. Florida and *Hurst v. State* require a jury trial on the facts that subject an individual to death. The State's burden of proof is beyond a reasonable doubt. As *Ivan. V* shows, the requirement of proof beyond a reasonable doubt is substantive thus requiring retroactive application under federal retroactivity standards. Once *Hurst v. Florida* established that the jury had to do the fact finding, that fact finding had to be made under the reasonable doubt standard. The jury trial of *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Mr. Hitchcock 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. This Court also made it abundantly clear that Mr. Hitchcock has the right to proof beyond a reasonable doubt. This Court should vacate his death sentence.

ARGUMENT VI

IN LIGHT OF *HURST*, MR. HITCHCOCK'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.

Mr. Hitchcock is entitled to relief under the Florida Constitution. On remand, this Court applied the Supreme Court's decision in *Hurst* in light of the Florida Constitution and held:

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may

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

Hurst v. State, 202 So.3d at 44. In *Perry v. State*, 210 So. 3d 630, 633–34 (Fla. 2016), this Court found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional and found:

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Hurst, SC12–1947, 202 So.3d at 634. 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 639–40, 639.

> While most of the provisions of the Act can be construed constitutionally in accordance with *Hurst*, the Act's requirement that only ten jurors, rather than all twelve, must recommend a death sentence is contrary to our holding in Hurst. *See id.* at 639, at 35 ("[W]e conclude under the commandments of Hurst v. Florida, [––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)], Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.").5 Therefore, we answer the second certified question in the negative, holding that the Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death.

Perry v. State, 210 So. 3d 630, 633–34 (Fla. 2016)

Thus, the then new statute was unconstitutional. This Court would later find the unconstitutional parts of the new statute severable. The increase in penalty imposed on Mr. Hitchcock was without any jury at all and unconstitutional. 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. Hitchcock received even less constitutional procedure than that which this Court found unconstitutional in the new statute.

Moreover, Mr. Hitchcock has a number of rights under the Florida Constitution that are at least coterminous with the United

States Constitution, and possibly more extensive. This Court should also vacate Mr. Hitchcock's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

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

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

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

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Hitchcock under an unconstitutional system, the State never presented the aggravating factors as elements for the Grand Jury to consider in determining whether to indict Mr. Hitchcock. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Hitchcock

was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Hitchcock was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment.

When *Hurst* and *Hurst v. State* were issued, it rendered the lack of a grand jury and notice in Mr. Hitchcock's case a violation of the Florida Constitution. If Mr. Hitchcock had a right to a jury trial, he had a right to all of the concomitant rights of an individual accused of a crime.

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

ARGUMENT VII

THIS COURT'S DENIAL OF MR. HITCHCOCK'S POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

Hurst and *Hurst v. State* have further removed the Florida sentencing scheme from constitutionality than it was at at the time that Mr. Hitchcock's last penalty phase. Mr. Hitchcock raised claims in his postconviction motion following this Court's affirmance of his death sentence that were adjudicated under an unconstitutional system. In applying the law to the facts raised in Mr. Hitchcock's postconviction motion, this Court determined

Mr. Hitchcock'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. Hitchcock incorporates his previously filed initial and amended postconviction 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. Hitchcock's previously denied claims and vacate Mr. Hitchcock's death sentence. Of particular importance:

1. Mr. Hitchcock raised a *Ring* Claim

Mr. Hitchcock raised a *Ring* claim and an expanded claim based on *Ring* in his state habeas petition. Mr. Hitchcock raised every issue that would lead to relief in *Hurst v. Florida*. Mr. Hitchcock was entitled to relief then and he is entitled to relief now. This Court should find that Mr. Hitchcock has overcome the law of the case and grant relief.

2. Mr. Hitchcock raised an issue that the trial court instructed the jury contrary to *Caldwell* based on a misreading of the jury instructions on the respective role of the advisory panel

Even though the standard jury instruction itself violates *Caldwell* the trial court compounded the constitutional violation when the trial judge minimized the jury's role in the sentencing process beyond the standard instruction by instructing the jury that:

> As you have been told, **your final decision** as to what punishment shall be imposed **is the responsibility of me as the judge.** However, it is your duty and responsibility to follow the law that I will now give you to render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of death penalty and what is sufficient mitigating circumstances exist to outweigh any aggravating circumstances you may find to exist.

1996 Vol VII R. 363. (Emphasis added).

Mr. Hitchcock argued in the petition and on appeal:

This instruction not only minimized the jury's function, it was also confusing to the jury because it inaccurately tracks the standard jury instruction. Based on a plain reading of the jury instruction as given in this case, not only was the jury's decision advisory, it was also the judge's responsibility. This informed the jury that it not only had no responsibility for determining whether Mr. Hitchcock received the death sentence, it also did not have any responsibility for its own decision as to what sentence should be imposed.

The result of the court's misreading of the jury instructions was that not only was the jury's role in what sentence Mr. Hitchcock received diminished, the jurors' role in what their own recommendation was to be was diminished. Counsel should have objected at the time that the Court misinformed the jurors of their role. This failure was both deficient and prejudicial under *Strickland* and was raised in the contemporaneous 3.851 appeal. However, the constitutional error is fundamental and apparent on

the face of the record and the deficiency is also apparent on the face of the record. Appellate counsel should have raised both the *Caldwell* claim as preserved by trial counsel in the motion and as fundamental error apparent on the record.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held that: it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". *Id.* at 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the sentencing determination is unreliable and may bias the jury to make a decision for death on the mistaken belief that the courts have the ultimate authority on all matters including fact-finding and will correct any mistake the jury may have made. This would deprive a defendant of his constitutional right to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. *Id*. at 330-331. The jury might be unconvinced that death is the appropriate punishment but still recommend a death sentence to express disapproval for the defendant's acts or "send a message to the community," believing the courts can and will cure the harshness. *Id*. at 331. "A defendant might thus be executed, although no sentencer had ever made a determination that death was

the appropriate sentence." *Id*. at 331-32.

Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," *McGautha v. California*, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. *Caldwell*, 472 U.S. at 332-33. As the *Caldwell* Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only factual guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis added).

CONCLUSION

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. *Hurst v. Florida* and *Hurst v. State* have corrected some of the unconstitutionality but, based on the fracturing of retroactivity,

the cases that remain are even further removed from rights guaranteed by the United States Constitution and the Florida Constitution. Mr. Hitchcock's death sentence was unconstitutional when he received it and even more so if this Court allows it to stand. This Court should grant relief.

CERTIFICATE OF SERVICE

We certify that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on Tayo Poopola, Assistant Attorney General on this 22nd day of May, 2017.

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We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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