No. SC17-___

IN THE

Supreme Court of Florida

JAMES ARMANDO CARD, SR.

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for a writ of habeas corpus calls on the Court to once again review the constitutionality of a death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Under those decisions, Petitioner James Armando Card, Sr.'s death sentence violates the United States and Florida Constitutions and should be vacated.

Hurst is retroactive to Petitioner and the *Hurst* error in his case was not harmless. This Court's precedent establishes that *Hurst* applies retroactively to death sentences that became "final" after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, Nos. SC14-436 & SC14-2108, 2016 WL 7406506, at *19 (Fla. Dec. 22, 2016); *see also Smith v. State*, No. SC12-2466 & SC13-2111, slip op. at 40 (Fla. Mar. 16, 2017) ("We have also determined that most defendants sentenced to death after the *Ring* decision should receive the benefit of *Hurst*."). The Court has also held that *Hurst* errors are not harmless where the jury recommended the death penalty by a non-unanimous vote. Petitioner's death sentence became "final" shortly after *Ring* was decided in 2002, and his jury recommended death by a non-unanimous vote of 11-1.

In "post-*Ring*, non-unanimous-jury-recommendation" cases that are indistinguishable from Petitioner's, this Court has granted habeas corpus relief under *Hurst*, vacated the petitioner's death sentence, and remanded for a new penalty phase

that complies with the *Hurst* decisions. *See, e.g.*, *McGirth v. State*, No. SC16-341, 2017 WL 372095, at *11-13 (Fla. Jan. 26, 2017); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (Fla. Mar. 10, 2017). In *Brooks*, the Court did so summarily.

Accordingly, for the reasons explained further below, Petitioner respectfully requests that this Court grant a writ of habeas corpus under the *Hurst* and *Mosley* decisions, vacate his death sentence, and remand for a new penalty phase.

JURISDICTION

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

REQUEST FOR ORAL ARGUMENT

Numerous decisions of this Court conclusively establish that *Hurst* relief is appropriate in this case. Petitioner respectfully requests oral argument.

BACKGROUND

Following his 1982 conviction for murder, Petitioner was resentenced in 1999 in the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County. After aggravating and mitigation evidence was presented at the penalty phase, the court instructed Petitioner's "advisory" sentencing jury as follows:

> It is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree.

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your advisory sentence should be based upon the evidence that has been presented to you in this proceeding.

State v. Card, Bay Co. No. 81-518 (Jury instructions filed April 1, 1999).

After deliberating, the jury, by a vote of 11-1, returned a generalized advisory recommendation to impose the death penalty. The jury's verdict stated, in full:

> WE, the Jury, find as follows: A majority of the jury, by a vote of 11 to 1 advise and recommend to the court that it impose the death penalty upon James Armando Card, Sr.

Card, No. 81-518 (Verdict filed April 1, 1999). The verdict form did not contain any findings of fact or specify the basis for the jury's non-unanimous recommendation.

The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the felony was committed while Petitioner was engaged in the commission of a kidnapping; (2) the murder was committed for the purpose of avoiding or presenting a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious or cruel; (5) the murder was committed in a cold, calculated and

premediated manner without any pretense of moral or legal justification. *Id.* (Order filed June 21, 1999). The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the aggravators were not outweighed by the mitigation.[1] Based upon this fact-finding, the court sentenced Petitioner to death. *Id.* This Court affirmed Petitioner's conviction and sentence. *Card v. State*, 803 So. 2d 613 (Fla. 2001).

Petitioner filed a petition for a writ of certiorari. On June 24, 2002, while his certiorari petition was pending, the United States Supreme Court decided *Ring*. Petitioner's sentence became "final" after the *Ring* decision, on June 28, 2002, when his certiorari petition was denied. *See Card v. Florida*, 536 U.S. 963 (2002); *see also King v. State*, No. SC14-1949, 2017 WL 372081, at *17 (Fla. Jan. 26, 2017) (noting that a sentence became "final" for purposes of *Hurst* retroactivity when the United States Supreme Court denied a writ of certiorari on direct appeal); *Knight v. State*, No. SC14-1775, 2017 WL 411329, at *4 (Fla. Jan. 31, 2017) (same); *Gaskin v. State*, No. SC15-1884, 2017 WL 224772, at *1 (Fla. Jan. 19, 2017) (same);

[1] The mitigation the court found included that Petitioner (1) had an upbringing that was "harsh and brutal" and his family background included an abusive stepfather; (2) had a good prison record; (3) is a practicing Catholic and made efforts for other inmates to obtain religious services; (4) was abused as a child; (5) served in the Army National Guard and was honorably discharged; (6) has artistic ability; and (7) has corresponded with school children to deter them from being involved in crime. *Id.*

Jimenez v. Quarterman, 555 U.S. 113, 119 (2009) (explaining that a sentence becomes final either when certiorari is denied or the time to seek certiorari expires).

In his initial Florida Rule of Criminal Procedure 3.851 motion, Petitioner argued that Florida's capital sentencing scheme was unconstitutional under *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2002). *See Card v. State*, 992 So. 2d 810, 813 n.4 (Fla. 2008). Petitioner acknowledged this Court's rulings, in cases like *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), that *Ring*'s Sixth Amendment holding was inapplicable to Florida's capital sentencing scheme because, prior to *Ring*, Florida's scheme had been upheld by the United States Supreme Court. Petitioner argued that this Court "misapplied the principles announced in *Ring*" and that Florida's death penalty scheme should be declared unconstitutional. *Card*, No. 81-518 (Motion filed April 2, 2004). The circuit court denied Petitioner's motion, rejecting his *Ring* claim on the ground that this Court's precedent had already established that *Ring* did not apply in Florida. *Id.* (Order filed June 9, 2006). This Court affirmed. *Card*, 992 So. 2d at 818.

Petitioner then sought federal habeas corpus relief in the United States District Court for the Northern District of Florida. *Card v. McNeil*, 4:08-cv-448, ECF No. 1 (N.D. Fla. Oct. 14, 2008). In 2010, federal habeas relief was denied. *Id.*, ECF No.

17. The United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability. *Card v. Sec'y*, No. 11-10123-P (11th Cir. 2011).[2]

ARGUMENT

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

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

[2] On November 2, 2016, Petitioner filed a successive Rule 3.851 motion in the circuit court, seeking relief under *Hurst*. However, in light of this Court's March 2017 summary grant of *Hurst* relief in the *Brooks* habeas proceeding, *see Brooks*, No. SC16-532, 2017 WL 944235, at *1, counsel for Petitioner determined that it was appropriate to seek *Hurst* relief directly in this Court, as this case is in a posture similar to *Brooks*. *See also McGirth*, 2017 WL 372095, at *11-13 (granting habeas relief under *Hurst*).

that before making its recommendation, the jury, not the judge, must make the findings of fact required to impose the death penalty under Florida law. *Id.*

In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires *unanimous* jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[3] This Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, No. SC14-990, 2017 WL 823600, at *16 (Fla. Mar. 2, 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death,

[3] As this Court correctly noted in *Hurst v. State*, "in interpreting the Florida Constitution and the rights afforded to persons within this State, this Court may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." 202 So. 3d at 57. This Court's unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death sentences may be imposed only upon unanimous jury verdicts.

unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court further cautioned that, even if the jury unanimously found each of the elements required to impose the death penalty satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

This Court also ruled that *Hurst* claims must be subjected to individualized harmless error review, and that the burden is on the State to prove, beyond a reasonable doubt, that the *Hurst* error did not impact the sentence. *Id.* at 67-68.[4] If the State is unable to make that showing, this Court will vacate the death sentence.

Petitioner's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered only a

[4] As explored further in section II, *infra*, this Court declined to rule that the error in Mr. Hurst's case was harmless beyond a reasonable doubt because the court found no reliable way to determine "what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt," or "how many jurors have found the aggravation sufficient for death," or "if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Id.* at 68.

non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation. However, the record is clear that Petitioner's jurors were *not* unanimous as to whether the death penalty should even be *recommended* to the court.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

The *Hurst* decisions apply retroactively to Petitioner. As explained in more detail in section III, *infra*, retroactivity analysis in this case is straightforward and easily resolved in Petitioner's favor under Florida law. In *Mosley*, this Court held that, under Florida's traditional retroactivity test, the *Hurst* decisions are retroactive to those, like Petitioner, whose death sentences became final on direct appeal after *Ring* was decided. *See* 2016 WL 7406506, at *19. In addition, as explained in sections IV-V, *infra*, the *Hurst* decisions are separately retroactive to Petitioner under this Court's equitable "fundamental fairness" doctrine and federal law.

II. The *Hurst* error in Petitioner's case was not harmless in light of the non-unanimous jury recommendation

Because Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*, and those decisions are retroactive to him under both state and federal law, *see*

sections III-V, *infra*, Petitioner should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was "harmless beyond a reasonable doubt." In the *Hurst* context, this Court has defined "harmless beyond a reasonable doubt" as "no reasonable probability that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68. The "State bears an extremely heavy burden" in this context. *Id.* at 68. This Court has noted that the State's ability to meet its harmless-error burden is "rare." *King*, 2017 WL 372081, at *17.

The *Hurst* error in Petitioner's case was not harmless beyond a reasonable doubt because his advisory jury recommended the death penalty by a non-unanimous vote of 11-1. This Court's precedent establishes that where, as here, the advisory jury's vote was not unanimous, the State cannot establish that the *Hurst* error was harmless beyond a reasonable doubt. In *Dubose v. State*, the Court made it clear that, "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of the applicable aggravating and mitigating circumstances. No. SC10-2363, 2017 WL 526506, at *12 (Fla. Feb. 9, 2017).[5]

[5] Although not directly relevant here, this is not to suggest that *Hurst* errors are harmless in all unanimous-recommendation cases. It is true that this Court has found *Hurst* errors harmless in some unanimous-recommendation cases, but the Court has also indicated that a unanimous jury recommendation is not by itself dispositive of the harmless error analysis. In another habeas corpus petition that is currently pending before this Court, the petitioner has presented significant arguments for why his *Hurst* error is not harmless despite the unanimous jury recommendation. *See Guardado v. Jones*, No. SC17-389 (filed Mar. 9, 2017). In the same petitioner's federal habeas case, a federal judge entered an indefinite stay of the proceedings

The Court has *never* found a *Hurst* error harmless in a case, like Petitioner's, where the jury vote was not unanimous. The Court has now addressed harmless error and granted relief in over a dozen non-unanimous-recommendation cases that are materially indistinguishable from Petitioner's. *See Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth*, 2017 WL 372095, at *12 (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*, No. SC15-1256, 2017 WL 224727, at *2 (Fla. Jan. 19, 2017) (10-2 jury vote); *Hodges v. State*, No. SC14-878, slip op. at 36 (Fla. Mar. 16, 2017) (10-2 jury vote); *Smith*, No. SC12-2466 & SC13-2111, slip op. at 40 (10-2 and 9-3 jury votes); *Franklin v. State*, No. SC13-1632, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) (9-3 jury vote); *Hojan v. State*, No. SC13-5, 2017 WL 410215, at *2 (Fla. Jan. 31, 2017) (9-3 jury vote); *Armstrong v. State*, No. SC14-1175, 2017 WL 224428, at *1-2 (Fla. Dec. 1, 2016) (9-3 jury vote); *Williams v. State*, No. SC14-814, 2017 WL 224529, at *18-19 (Fla. Dec. 22, 2016) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (8-4 jury vote); *Mosley*, 2016 WL 7406506, at *25-26 (8-4 jury vote); *Dubose*, 2017 WL 526506, at *11 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4 jury vote); *Calloway v.* State, No. SC10-2170, 2017 WL 372058

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because the petitioner has non-frivolous arguments to make in state court regarding his entitlement to *Hurst* relief, notwithstanding the unanimous jury recommendation. *See Guardado v. Jones*, No. 4:15-cv-256, ECF No. 30 (N.D. Fla. Feb. 11, 2017).

(Fla. Jan. 26, 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote); *see also Brooks*, 2017 WL 944235 (9-3 and 11-1 jury votes). The same harmless error result should occur in Petitioner's case.

The *Dubose* holding that *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of this Court's analysis in *Hurst v. State*. Under *Hurst v. State*, this Court emphasized that Florida's courts may not speculate that, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. As this Court cautioned, engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So. 3d at 69; *see also Mosley*, 2016 WL 7406506, at *26. The reasoning the Court applied in *Hurst v. State* applies in Petitioner's case.

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68.

Even if precedent allowed courts to find *Hurst* errors harmless in cases with non-unanimous jury recommendations, the State still could not show that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt. First, there is no

reason to believe that the one juror who voted to recommend a life sentence would have made the fact-finding required to impose the death penalty in a hypothetical constitutional proceeding. On the contrary, it is more likely that *fewer* jurors would have made the required fact-finding than voted for an advisory recommendation to impose the death penalty. That is because the jury's consideration of the evidence would have been different in a way beneficial to Petitioner if the jury had been required to conduct the fact-finding instead of making a general sentencing recommendation. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing significant negative impact of a jury's belief that ultimate responsibility for determining whether defendant will be sentenced to death lies elsewhere). In order to further reliability in capital sentencing, the United States Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotes omitted). Under Florida's prior unconstitutional scheme, the jurors did not provide a recommendation with an understanding of their personal responsibility.

Second, in a hypothetical constitutional system, the jury's fact-finding would have been significantly impacted by the mitigation presented at the penalty phase. In *Hurst v. State*, this Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("[W]e cannot find beyond a

reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence."). The trial judge found numerous mitigating circumstances, including that Petitioner had a harsh and brutal upbringing, that he was abused as a child, and that he had served in the Army National Guard and received an honorable discharge. *See supra* at 4 n.1. It cannot be convincingly demonstrated that jurors would find otherwise.

Third, if Petitioner's counsel's thinking had not been influenced by the statutory framework struck down by *Hurst*, Petitioner and counsel could certainly have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. As such, it cannot be concluded that a jury unanimously would find any specific aggravators and reject mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote).

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that, among the aggravators applied to Petitioner, were those based on contemporaneous and/or prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators.

See, e.g., *Franklin*, 2016 WL 6901498, at *6 (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*."); *McGirth*, 2017 WL 372095, at *2 (contemporaneous felony); *Mosley*, 2016 WL 7406506, at *3 (contemporaneous felony); *Armstrong*, 2017 WL 224428, at *1 (prior violent felony); *Calloway*, 2017 WL 372058, at *9 (prior violent felony); *Durousseau*, 2017 WL 411331, at *6 (prior violent felony); *Simmons*, 207 So. 3d at 861 (prior violent felony); *Williams*, 2017 WL 224529, at *6 (prior violent and contemporaneous felonies). Notably, this Court found the *Hurst* error *not* harmless in *Mosley* despite the fact that the judge in that case had found a contemporaneous felony aggravator. *Mosley*, 2016 WL 7406506, at *3. The same reasoning should apply in Petitioner's case.

For the foregoing reasons, this Court should apply to Petitioner's case its uniform approach of ruling *Hurst* errors not harmless based on the jury's non-unanimous recommendation.[6]

[6] If this Court for some reason diverges from its precedent establishing that all *Hurst* errors in non-unanimous-recommendation cases are not harmless, any doubts as to whether the *Hurst* error in Petitioner's case was harmless should be resolved only after a remand for an evidentiary proceeding, at which counsel can develop evidence regarding the impact of the error, particularly as it relates to the effect on defense counsel's strategy, challenges to the aggravation, and presentation of mitigation.

III. The *Hurst* decisions apply retroactively to Petitioner under a *Witt* analysis because his sentence became final after *Ring*

As noted above, retroactivity analysis in this case is straightforward and easily resolved in Petitioner's favor. The *Hurst* decisions are retroactive to Petitioner under Florida's traditional retroactivity analysis, which was articulated in *Witt v. State*, 387 So. 2d 922 (1980). In *Mosley*, this Court held that, "under a standard *Witt* analysis, *Hurst* should be applied to Mosley and *other defendants* whose sentences became final after the United States Supreme Court issued its opinion in *Ring*." 2016 WL 7406506, at *19 (emphasis added); *see also id.* ("Defendants who were sentenced to death . . . after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida . . . ."); *Smith*, No. SC12-2466 & SC13-2111, slip op. at 40 ("We have also determined that most defendants sentenced to death after the *Ring* decisions should receive the benefit of *Hurst*.").[7]

[7] Although not directly at issue here, it does *not* follow that all defendants whose sentences became final before *Ring* are categorically excluded from retroactive application of the *Hurst* decisions under a standard *Witt* analysis. The decisions in *Mosley* and *Asay v. State*, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538 (Fla. Dec. 22, 2016), together establish that *Witt* retroactivity is also subject to an individualized analysis, and that pre-*Ring* defendants may be entitled to *Witt* retroactivity depending on the individualized circumstances of their case. Moreover, as explained in section IV, *infra*, a *Witt* analysis is not the only manner by which the *Hurst* decisions may be held to apply retroactively in a particular case under Florida law—in addition to or instead of *Witt*, courts may apply the *Hurst* decisions retroactively under this Court's "fundamental fairness" doctrine. In addition, retroactive application of *Hurst* is required under federal law. *See* section V, *infra*.

Petitioner's sentence became "final" after the *Ring* decision, on June 28, 2002, when his certiorari petition was denied. *See Card*, 536 U.S. 963; *see also King*, 2017 WL 372081, at *17 (noting that a sentence became "final" for purposes of *Hurst* retroactivity when the United States Supreme Court denies a writ of certiorari on direct appeal); *Knight*, 2017 WL 411329, at *4 (same); *Gaskin v. State*, 2017 WL 224772, at *1 (same); *Jimenez*, 555 U.S. at 119 (explaining that a sentence becomes final either when certiorari is denied or the time to seek certiorari expires).

That resolves the retroactivity question in this case because, as this Court made clear in *Mosley*, the *Hurst* decisions are retroactive to *all* post-*Ring* sentences under a *Witt* analysis. Because Petitioner's death sentence became final after *Ring* was decided, this Court should apply *Hurst* in this case retroactively.

IV. The *Hurst* decisions are separately retroactive to Petitioner under the fundamental fairness doctrine

Although *Witt* provides a sufficient basis to apply the *Hurst* decisions retroactively to Petitioner, it should also be noted that the *Hurst* decisions are separately retroactive to him under this Court's fundamental fairness doctrine. As this Court explained in *Mosley*, although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to *Hurst* retroactivity by virtue of the fundamental fairness doctrine, which the Court has previously applied in cases like *James v. State*, 615 So. 2d 668 (Fla. 1993). *Mosley*, 2016 WL 7406506, at *19 ("This Court has previously held that fundamental fairness alone may require the

retroactive application of certain decisions involving the death penalty"). Fundamental fairness is an equitable analysis that does not rely on *Witt*.

Fundamental fairness differs from *Witt* analysis by focusing on whether it would be unfair to bar the defendant from seeking *Hurst* relief. The doctrine applies where the defendant previously attempted to challenge Florida's unconstitutional capital sentencing scheme. *Id.* at *18-19 & n.13 ("The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument."). This Court emphasized in *Mosley* that ensuring fundamental fairness in retroactivity analysis outweighed any state interest in the finality of death sentences. *Id.* at *19. The date a sentence became final relative to when *Ring* was decided is not relevant in fundamental fairness analysis.

In *Mosley*, this Court drew an analogy to *James*'s retroactive application of the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). In *James*, this Court concluded "that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating

factor was unconstitutionally vague were entitled to the retroactive application of *Espinosa*." *Id.* In *Mosley*, this Court explained that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*." *Id.* This Court was correct because, under the *Hurst* decisions, "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted). The application of the fundamental fairness doctrine thus makes as much sense for *Hurst* claims as for *Espinosa* claims.

Petitioner is entitled to retroactive application of the *Hurst* decisions under the fundamental fairness doctrine, separate and apart from *Witt*, because he raised a challenge to Florida's unconstitutional capital sentencing statute at his earliest possible opportunity. Because *Ring* was decided while his petition for certiorari on direct appeal was pending in the United States Supreme Court, and his certiorari petition was denied shortly thereafter, Petitioner's earliest opportunity to raise a *Ring* claim was in his initial Rule 3.851 motion. As noted above, Petitioner raised a *Ring* claim in his Rule 3.851 motion, arguing that this Court in earlier cases like *Bottoson* had "misapplied the principles announced in *Ring*" and that Florida's death penalty

scheme should be declared unconstitutional. His claims were rejected under this Court's precedent, which was later overruled by *Hurst v. Florida* and *Hurst v. State*.

Under the fundamental fairness doctrine, these circumstances provide an ample basis to apply the *Hurst* decisions retroactively to Petitioner, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in the *Hurst* decisions and raised those defects at the earliest opportunity available to him. As a matter of fundamental fairness, Petitioner should not now be denied the chance to seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Petitioner "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and, as this Court has made clear, "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 2016 WL 7406506, at *25.

V. Although this Court has not yet addressed the federal implications of *Hurst* retroactivity, the United States Constitution requires retroactive application of the *Hurst* decisions to Petitioner

In addition to *Hurst* being retroactive to Petitioner under both the *Witt* and fundamental fairness retroactivity doctrines as a matter of Florida law, the federal Constitution protects Petitioner's right to *Hurst* retroactivity. Federal law requires *Hurst* to be applied retroactively even by state courts applying state retroactivity doctrines. Petitioner's federal right to *Hurst* retroactivity does not turn on the date

his sentence became final relative to the date *Ring* was decided. Federal law does not countenance the concept of "partial retroactivity," under which a new constitutional rule is applied to some cases on collateral review but not to others.

Petitioner's federal right to *Hurst* retroactivity is highlighted by the United States Supreme Court's recent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See id.* at 731-32 ("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."). In *Montgomery*, the petitioner initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles unconstitutional). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under state retroactivity law. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that, under the United States Constitution, may not be denied to Florida defendants on state retroactivity grounds. In fact, in *Hurst v. State*, this Court announced two substantive rules. First, this Court ruled in *Hurst v. State* that the Sixth Amendment requires that juries decide, *beyond a reasonable doubt*, whether each of the elements of a death sentence have been satisfied—certain aggravating factors have been proven, the aggravators are sufficient to impose the death penalty, and the aggravators outweigh the mitigation. Such findings are manifestly substantive.[8] *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is a person "whose crimes reflect

[8] The Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) is distinguishable. In *Summerlin*, the Supreme Court applied the federal retroactivity test in *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. But *Summerlin* did not review a capital sentencing statute like Florida's that requires the jury not only to make fact-finding regarding the applicable aggravators, but also as to whether the aggravators were *sufficient* for the death penalty. Moreover, unlike *Ring*, *Hurst* 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 Powell v. Delaware*, 2016 WL 7243546, at *3 (Del. Dec. 15, 2016) (holding *Hurst v. Florida* retroactive under state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* as "only address[ing] the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."); *see also Guardado*, No. 4:15-cv-256, ECF No. 20 (N.D. Fla. May 27, 2016) (federal judge explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* unlike *Hurst* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).").

the transient immaturity of youth" is substantive, not procedural). The Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, this Court held in *Hurst v. State* that the Eighth Amendment requires the jury's finding of the elements during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As this Court made clear, the function of the unanimity-of-fact-finding rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id*. at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting

that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that, in light of the "post-*Ring*, non-unanimous-jury-recommendation" posture of his case, this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase. This request is consistent with this Court's *Hurst* rulings in other habeas corpus proceedings that are indistinguishable from Petitioner's. *See*, *e.g.*, *McGirth*, 2017 WL 372095, at *11-13; *Brooks*, 2017 WL 944235, at *1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, the foregoing was served via the e-portal to Assistant Attorney General Jennifer L. Keegan, counsel for Respondent, at Jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com, and Leor Veleanu at leor_veleanu@fd.org.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

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

/s/ Billy H. Nolas
Billy H. Nolas