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IN THE SUPREME COURT OF FLORIDA

MARVIN BURNETT JONES
Appellant,

v.

CASE NO. SC17-497
Lower ct. 161993CF002757AXXXMA

STATE OF FLORIDA
Appellee.
___________________/

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This appeal address the retroactivity of *Hurst v. Florida*, 136 S.Ct. 616 (2016) [hereafter, *Hurst*] when the Appellant raised the issues identified in *Hurst* in the trial court, but whose case was final on direct appeal prior to the issuance of *Ring v. Arizona*, 122 S. Ct. 2428 (2002)[hereafter, *Ring*].

The record in the instant proceeding is one volume and will be referenced by "R", followed by the page number. References to prior proceedings, including the trial, direct appeal, and prior postconviction transcripts will be reference by the page number and "T" for trial records and transcripts and "P" for prior postconviction records and transcripts.

STATEMENT OF THE CASE AND FACTS

Mr. Jones was indicted in the Circuit Court for the Fourth Judicial Circuit on one count of first degree murder and one count of attempted first degree murder on March 18, 1993. [T10-12] The State sought the death penalty.

During the pretrial proceedings Mr. Jones challenged the role of the jury in Florida's capital sentencing scheme. Mr. Jones filed a Motion To Prohibit Misleading References To the Advisory Role of the Jury at Sentencing on August 26, 1995, which sought, under *Caldwell v. Mississippi*, 372 U.S. 320 (1985), to prohibit the jury from being instructed their recommendation was advisory and to prohibit prosecutorial

argument to that effect as well in violation of the United States Constitution.[T35-36] The motion was denied by the trial court.[181-89] Defense counsel renewed his objection to the denial of this motion in the Amended Motion for New Trial filed on March 2, 1994, which the trial court denied.[T299;302]

Mr. Jones was convicted as charged on both counts.[T286-87] The penalty phase jury was given the standard jury instructions, including being instructed that the recommendation did not have to be unanimous and the ultimate sentencing decision would be determined by the trial judge.[T294-96] The jury returned a recommendation of death by a vote of 9-3.[T288]

The trial court made the following factual findings pursuant to §921.141 on aggravation and mitigation: The trial court found three aggravating factors: (1) the defendant had been convicted of a prior violent felony (the contemporaneous attempted murder charge), (2) the murder was cold, calculated, and premeditated, and (3) the murder was committed for pecuniary gain.[T325-330] The trial court found the following mitigating circumstances: (1) the defendant had no significant history of prior criminal activity; (2) aspects of the defendant's character including: his 8 year Naval service during which he held positions of responsibility, commendations, and honorable discharge; the defendant was married with two children; the defendant had supportive family and had a secure middle class

childhood with hard working parents.[T331-32] The trial court determined the aggravators were not outweighed by the mitigating circumstances and imposed a death sentence.[T333-34] A written order, required by statute, was entered.[T313-336]

Mr. Jones appealed his conviction to this Court, which affirmed in *Jones v. State*, 690 So.2d 568 (Fla. 1996). Mr. Jones challenged the sufficiency of the evidence for the CCP and pecuniary gain aggravators, the CCP jury instruction, and the proportionality of his sentence. Certiorari was denied by the United States Supreme Court the following year. *Jones v. Florida*, 522 U.S. 880 (1997).

Mr. Jones first filed a "shell" motion for postconviction relief on September 17, 1998.[P19-54] This motion was amended several times. Ultimately, an Amended Motion for Postconviction Relief raising 23 claims was filed on April 29, 2002.[P126-215] This motion included a claim that his death sentence was unconstitutional under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) in Ground 19 and that the penalty phase jury instructions improperly denigrated the role of the jury in violation of *Caldwell v. Mississippi* in Ground 11.[P173-175;198] In addition to these claims, Mr. Jones also argued in his Amended Motion for Postconviction Relief that defense counsel had been ineffective in failing to present additional mitigation which had existed at

the time of the original penalty phase and sentencing hearing in Grounds 13,14, and 15.

On August 23, 2002, a Supplement to the Amended Motion for Postconviction Relief was filed addressing the then recent holding in *Ring v. Arizona*, 122 S.Ct. 2428 (2002) and argued Mr. Jones' death sentence was unconstitutional under *Ring*.[P345-355]

The Amended Motion for Postconviction Relief raised a claim requesting juror interviews based on statements made by jurors reported in a newspaper article published by the *Florida Times-Union* on March 12, 1995 about the jurors' thoughts on their role in penalty phase. Several jurors indicated to the press their role in penalty phase was much easier because the judge made the sentencing determination. The trial court denied the request to interview jurors further.[P 216-223]

Following a *Huff* hearing and an evidentiary hearing, the trial court denied all claims by written order on January 23, 2004.[P428-471]

Mr. Jones appealed the denial of his postconviction proceedings to this Court, which affirmed at *Jones v. State*, 928 So.2d 1178 (Fla. 2006). This Court rejected Mr. Jones' *Ring* claim, finding it would not be applied retroactively and rejected his claim requesting to investigate juror impropriety because the comments expressed by the jury foreman and two other jurors who voted for death "inhered" in the verdict.

In January 2016, the United States Supreme Court invalidated Florida's death penalty sentencing scheme premised on *Ring*. Mr. Jones filed a Successor Postconviction Motion on January 3, 2017, arguing he was entitled to the benefit of *Hurst* because he had been challenging the constitutionality of Florida's death penalty sentencing scheme on the same grounds raised in *Hurst* and *Ring* since 1995 and renewed those challenges in a timely manner after the issuance of *Apprendi* and *Ring.*

Mr. Jones sought to have his death sentence vacated due to the lack of unanimity in the jury recommendation in his case and the failure of the jury to make the specific finding on aggravation, mitigation, and death penalty eligibility as required in *Hurst*.[R5-13] Mr. Jones further argued that a life sentence should be imposed and/or he should be entitled to a new guilt/innocence phase.[R13-15]

The State filed an Answer to Successive Rule 3.851 Motion For Postconviction Relief on January 5, 2017.[R16-37] The State relied on this Court's decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), *rehearing denied*, 2017 WL 431741 (Fla. Feb. 1, 2017)[hereafter, *Asay*], which held that *Hurst* was not retroactive to cases which were final prior to the issuance of *Ring* on June 24, 2002.[R6] The State argued that judges are often better fact finders than juries, thus Mr. Jones' death sentence was not unfair or inaccurate.[R22] The State further

argued the contemporaneous conviction removed Mr. Jones from any *Hurst* consideration, and any error that might have occurred was harmless.[R25-29].

After the filing of the State's Response, this Court decided *Gaskin v. State*, 2017 WL 224772 (Fla. January 19, 2017). In *Gaskin* this Court rejected Gaskin's claim that fundamental fairness required retroactive application of *Ring* where Gaskin had raised *Ring* claims prior to *Rings'* issuance, but his case became final on direct appeal prior to the issuance of *Ring*.[R41]

The trial court entered a written order, summarily denying relief, on February 13, 2017.[R38-42] In addition to *Asay*, the trial court relied on the "Asay/Mosley/Gaskin triad" to deny relief on the ground that in each of those cases this Court determined *Hurst* would not apply retroactively to cases which were final on direct review prior to issuance of *Ring.* Mr. Jones timely filed a Notice of Appeal on March 8, 2017.[R45]

SUMMARY OF THE ARGUMENT

The determination by the Court that the *Hurst* decisions are not retroactive to those cases final on direct appeal prior to the issuance of *Ring* is incorrect. This determination was a result of the misapplication of the doctrine of fundamental fairness. Defendant's whose sentences were final prior to *Ring*,

but who had consistently raised claims premised on the rationale of *Ring* and the *Hurst* decisions are entitled to relief under fundamental fairness principals. Further, a retroactivity analysis under *Witt*, utilizing the individual case specific analysis used in *Asay* and *Mosley* would compel retroactive application of the *Hurst* decisions in this case. The determination that pre-*Ring* cases will not have benefit of the *Hurst* decisions violates the federal retroactivity requirement. The *Hurst* decisions were substantive in nature and affect eh class of persons eligible for a death sentence, which requires retroactivity under the United States Constitution.

Mr. Jones is entitled to be sentenced to life under Florida Statutes Section 775.082(5)

ARGUMENT

ISSUE I

THE *HURST* DECISIONS SHOULD APPLY RETROACTIVELY TO DEATH SENTENCES SUCH AS MR. JONES' WHICH BECAME FINAL PRIOR TO *RING* WHERE THE SUBSTANTIVE BASIS FOR *RING* WAS RAISED BY THE DEFENDANT IN PRIOR PROCEEDINGS AND REJECTED BY FLORIDA COURTS.

In *Asay v. State*, 210 So.3d 1 (Fla. 2016), *rehearing denied*, 2017 WL 431741 (Feb. 1, 2017)[hereafter, *Asay*], this Court held that *Hurst* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016)[hereafter, *Hurst v. State*] do not apply retroactively to defendants whose sentence became final on direct appeal before the decision in *Ring v. Arizona*, 536 U.S. 584 (2002)[hereafter,

Ring]. Then, in *Gaskin v. State*, 2017 WL 224772 (Fla. January 19, 2017[hereafter, *Gaskin*], relief was denied to a defendant who had made the same challenges to the constitutionality of Florida's capital sentencing scheme prior to *Ring* which were addressed in *Hurst*, but whose case became final on direct appeal prior to *Ring. Ibid.*, Pariente, J., *dissenting*.

Mr. Jones submits the decisions of this Court in *Asay* and *Gaskin* were improperly decided on the question of retroactivity and should be reversed. Mr. Jones is entitled to retroactivity of *Hurst* and *Hurst v. State*, under either a fundamental fairness analysis or analysis under Florida's retroactivity doctrine under *Witt v. State*, 387 So.2d 922 (1980)[hereafter, *Witt*]. Federal law requires retroactivity of the *Hurst* decisions to Mr. Jones.

The State cannot meet its burden of proving beyond a reasonable doubt that the *Hurst* decisions' error was harmless in this case. Mr. Jones' 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, Mr. Jones' jury rendered only a generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating 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. The newspaper story detailing the comments of three of the jurors casts significant doubt as to any unanimity at all. Mr. Jones' death sentence violates the Sixth and Eighth Amendments in light of the *Hurst* decisions.

The standard of appellate review applicable to this case is *de novo*. *See, Reed v. State*, 116 So.3d 260, 264 (Fla. 2015). Mr. Jones should be afforded an individualized, retroactive application of the *Hurst* decisions under three independent grounds:(1) the doctrine of fundamental fairness, (2) under the traditional Florida retroactivity analysis in *Witt*, and (3) as a matter of federal law.

A. Mr. Jones is entitled to retroactivity of the *Hurst* decisions under the doctrine of fundamental fairness

In *Mosley v.* State, 209 So.3d 1248 (Fla. 2016), the Court held that *Hurst* and *Hurst v. State* retroactivity may be determined by either a *Witt* analysis or under the separate fundamental fairness doctrine. Mr. Jones submits that under the fundamental fairness doctrine he is entitled to the retroactive application of the *Hurst* decisions.

The doctrine of fundamental fairness, as set forth in *Mosley*, requires the court to review and assess all of the facts

of each case and focuses solely on whether it would be unfair to bar relief. In cases where the defendant previously attempted to challenge Florida's capital sentencing scheme, given those challenges were consistently rejected under this Court's pre-*Hurst* and pre-*Ring* law, it would be fundamentally unfair to deny the relief afforded under the *Hurst* decisions. In *Mosley* the Court found the doctrine of fundamental fairness applied to Mosley, thus entitling him to *Hurst* retroactivity. The Court noted that Mosley had raised *Ring* claims at the first opportunity and had been rejected every time. *Mosley* made no distinction between pre-*Ring* and post-*Ring* cases.

In *Mosley* the Court explained an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst* and *Hurst v. Florida* were decided. *See, Id.*, at 1275. If Mosely had raised such a challenge, the Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst* given that he had anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in *Hurst*. In assessing retroactivity, fundamental fairness outweighed the State's interest in the finality of death sentences. The Court drew an analogy with *James v. State*, 615 So.2d 668 (Fla. 1993), which had addressed the retroactive application of *Espinosa* and the HAC aggravating

factor jury instruction, but noted the issue presented by *Hurst* was even greater than the issue in *James*, as the fundamental right to a jury trial was implicated in *Mosley* and not just a jury instruction.

Mr. Jones submits, that under *Mosley* and the doctrine of fundamental fairness, he should be entitled to relief under *Hurst*, where he raised constitutional challenges to Florida’s capital sentencing scheme prior to *Ring*. Mr. Jones challenged the jury’s role in sentencing in the trial court in 1995. Subsequent to the issuance first of *Apprendi* and then *Ring*, Mr. Jones raised challenges specifically citing to both *Apprendi* and *Ring* in his postconviction motion.

In this case Mr. Jones anticipated the defects in Florida’s statute that were later articulated in *Hurst* and *Hurst v. State.* Although Mr. Jones’ direct appeal was pre-*Ring*, he attempted to challenge Florida’s unconstitutional capital sentencing statues before *Hurst, Ring,* and *Apprendi* in his pre-trial motions, at trial, and in postconviction proceedings. Under the rationale of *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Mr. Jones. Just as in *Mosley*, finality should yield to fundamental fairness. Applying the *Hurst* decisions retroactively to Mr. Jones “in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness,”

and “it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty.” *Mosley,* at 1285.

Defendants, such as Mr. Jones, who anticipated defects in Florida’s statute that were later articulated in the *Hurst* decisions should not be denied the chance to now seek relief under the *Hurst* decisions.

B. Mr. Jones is entitled to retroactivity of the *Hurst* decisions under *Witt* pursuant to an individualized analysis.

Mr. Jones submits that he is entitled to retroactivity under the *Witt* analysis employed by the Court in *Asay*. Mr. Jones is entitled to case-specific *Witt* retroactivity analysis, in which his pre-*Ring* sentence would be a factor weighed against retroactivity, but not a dispositive factor mandating denial of relief. This principle is in accord with the rejection of the binary concept of retroactivity under *Mosley*, *Asay,* and *Gaskin*.

Traditionally, retroactivity has been a binary concept- a new constitutional rule is either retroactive to all cases on collateral review or to none. In *Mosley* and *Asay* the Court has rejected the binary concept in favor in an individual, case specific *Witt* assessment. The Court suggested that a pre-*Ring* sentence was a factor weighing against *Witt* retroactivity, while a post-*Ring* sentence was a factor favoring *Witt* retroactivity. This analysis derives from the United States Supreme Court

decisions in *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965). Accordingly, the Court reached individualized conclusions in *Asay, Mosley,* and *Gaskin* on the third prong of *Witt.*

Under a *Witt* analysis of retroactivity three prongs are considered: (1) the change in the law emanated from the United States Supreme Court; (2) the change is constitutional in nature; and (3) the decision represents a development of fundamental significance or is of sufficient magnitude to warrant retroactivity. The *Stovall/Linkletter* test is then applied to the third prong, which analyzes the purpose to be served by the new rule, the reliance on the old rule, and the effect of applying the new rule to the administration of justice, which requires a balancing of the justice system's goals of fairness and finality." *Hurst v. Florida*, at 32.

In *Asay* the Court ruled the first *Stovall/Linkletter* factor- the purpose of *Hurst*- weighed in favor of retroactivity, while in *Mosley* the Court ruled the first factor weighed "*heavily* in favor of retroactivity." *See*, *Asay*, 210 So.3d at 18; *Mosley* 209 So.3d at 1276. As to the second *Stovall/Linkletter* factor, the extent of reliance on pre-*Hurst* law- the Court found in *Asay* that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactivity, while in *Mosley*, the Court reached the opposite

conclusion, holding that the extent of reliance on the same pre-*Hurst* law weighed "in favor' of retroactivity. *Asay*, 210 So.3d at 20; *Mosley*, 209 So.3d at 1278. *Asay* and *Mosley* also differed as to the third *Stovall/Linkletter* factor- the effect on the administration of justice- finding it weighed "heavily against" retroactive application in *Asay*, but in favor of retroactive application in *Mosley*. *See*, *Asay*, 210 So.3d at 22; *Mosley*, 209 So.3d at 1280.

As applied to Mr. Jones, the first *Stovall/Linkletter* factor- the purpose of the *Hurst* decisions- weighs in favor of retroactivity. The purpose of the rule is "to ensure a defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury." *Asay*, 210 So.3d at 17. When combined with the determination in *Mosley* that this factor "weighs heavily in favor" of retroactivity, Mr. Jones submits the right to a trial by jury must be among the highest priorities of the courts, particularly in capital cases.

As applied to Mr. Jones, the second *Stovall/Linkletter* factor- the extent of reliance on Florida's unconstitutional pre-*Hurst* scheme- also weighs in favor of applying those decisions retroactively. The decisions in *Asay* and *Mosley* present confused conceptions of the familiar "extent of reliance" factor.

In an ordinary retroactivity analysis, whether under *Witt* or any other analytic framework, the extent of reliance on the law prior to the creation of the new rule would be the same. The body of law that developed and was applied before the new rule does not change no matter the particular case in which retroactivity is analyzed. But in *Asay* and *Mosley* this Court reached different conclusions regarding the extent of reliance on pre-*Hurst* law depending on the date the defendant's sentence became final. *Asay* and *Mosely* also split on whether "good faith" should be considered in analyzing the second *Stovall-Linkletter* factor, further confusing the matter.

In *Asay*, which considered only *Hurst v. Florida*, the Court said the extent of reliance on pre-*Hurst* law as applied to a pre-*Ring* sentence weighed heavily against retroactivity because before the issuance of *Ring* in 2002, the Florida courts and the State of Florida had relied in good faith on Florida's unconstitutional death penalty law in light of the failure of the United States Supreme Court to inform them otherwise. Good faith supported the extent of reliance factor to weigh heavily against retroactivity. *Asay*, 210 So. 3d at 19-20.

But in *Mosley* the Court held "[t]he 'extent of reliance' prong is not a question of whether this court properly or in good faith relied on United States Supreme Court precedent, but how the precedent changed the calculus of the constitutionality

of Florida's death penalty scheme." *Mosley*, 209 So.3d at 1286. Applying the extent of reliance factor, absent the good faith component, resulted in the second *Stovall/Linkletter* factor being weighed in favor retroactivity to all post-*Ring* defendants in *Mosley*.

This Court should now consider exactly what the second *Stovall/Linkletter* factor requires: the extent of reliance on Florida's capital sentencing scheme before *Hurst* decisions, *i.e.*, "[t]he extent to which a condemned practice infect[ed] the integrity of the truth-determining process at trial." *Stovall*, 388 U.S. at 297. Under a proper analysis, it is clear Florida's unconstitutional sentencing scheme has not just been unconstitutional since *Ring* was decided in 2002. It has always been unconstitutional and it consistently and systematically infected the truth-determining process at penalty phase proceedings since the statute was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972). Accordingly, Mr. Jones submits, as *Mosley* concluded, the second *Stovall/Linkletter* factor weighs in favor of applying the *Hurst* decisions retroactively in this case.

As applied to Mr. Jones, the third *Stovall/Linkletter* factor-the effect on the administration of justice- also weighs in favor of applying the *Hurst* decisions retroactively to pre-*Ring* cases. As recognized in *Asay*, this factor does not weigh

against retroactivity unless applying the *Hurst* decisions retroactively would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 [quoting *Witt*, 387 So. 2d at 929-30]. In *Mosley*, the Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, approximately 175 individuals, would not grind this state's judiciary to a halt. *Mosley*, 209 So.3d at 1282.

In light of that conclusion, there can be no serious rationale for a prediction that categorically permitting retroactive application of the *Hurst* decisions to the approximately 175 remaining pre-*Ring* defendants like Mr. Jones, would tip the balance so far in the other direction as to "destroy" the judiciary. Retroactive application to pre-*Ring* cases will have more impact on the administration of justice than not, but that is not the test. Without sufficient rationale for predicting that 175 retroactive *Hurst* proceedings would be manageable, but that 175 more would "destroy" the judiciary, retroactivity should not be denied to pre-*Ring* defendants.

Retroactive application to a much larger populations has been approved. In *Montgomery v. Louisiana*, 136 U.S. 718 (2016),

the United States Supreme Court approved the retroactive application of a new ruled prohibiting mandatory life sentences for all juveniles. One study predicted this retroactive determination would affect as many as 2,300 cases nationwide. *See*, John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders,* The Phillips Black Project; available at http://www.phillipsblack.org/s/JLWOP-2pdf (lase visited March 8, 2017). In Florida, capital cases "make up only a small percentage (0.09 percent) of the 171,414 criminal cases filed in circuit court during the fiscal year 2014-15, and an even smaller percentage (0.02 percent) of the 753,011 total cases filed in circuit court." *Asay*, 210 So.3d at 39 (Perry, J., dissenting).

Any argument that resentencing hearings would be problematic because the State would have to reassemble old witnesses and evidence is not a basis to deny Mr. Jones the opportunity to be sentenced in compliance with the United States and Florida Constitutions. "*Hurst* creates the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld." *Asay*, 210 So.3d at 35.(Pariente, J., dissenting). Difficulty assembling witnesses or evidence for a new penalty phase, even adopting speculative or dubious

predictions that prior evidence could not be introduced is not an adequate or appropriate basis to deny Mr. Jones a constitutionally adequate proceeding to determine whether he should be sentenced to death. It clearly had to be done in Mr. Hurst's case, since the original conviction occurred in 1998. Other defendants, whose cases predate the conviction in this case, would be or have been granted relief. *See*, *Johnson v. State*, 205 So.3d 1285 (Fla. 2016)[reversed for *Hurst* relief with original conviction in 1983, conviction after retrial 1987], *Cardona v. State,* 195 So.3d 514 (Fla. 2016)[1990 conviction]; *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)[awaiting retrial from original 1985 homicide conviction], *Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F.3d 541 (11th Cir. 2015)[reversal for new sentencing from 1984 homicide]. It is not appropriate to force Mr. Jones to remain under an unconstitutional death sentence when such a result is merely caused by a "roll of the dice". *Asay*, 210 So.3d at 40 (Perry, J., dissenting). Contrary to the reasoning of the majority in *Asay* and *Gaskin*, the third factor of the *Stovall/Linkletter* test should be weighed in favor of retroactivity.

Mr. Jones is entitled to relief afforded by the *Hurst* decisions under a *Witt* analysis.

C. Mr. Jones has a federal right to retroactivity of the *Hurst* decisions under the United States Constitution.

In *Asay* and *Gaskin*, the Court reviewed the retroactivity of *Hurst* under the state retroactivity doctrine announced in *Witt* only and limited retroactivity to those cases which were not final on direct appeal at the time *Ring* was issued. The effect of *Mosley*, *Asay,* and *Gaskin* was to reject retroactivity as a binary concept and to endorse a case-by-case partial retroactivity analysis.

The concept of "partial retroactivity" under *Asay* and *Gaskin* is unconstitutional under both the United States and Florida Constitutions, which will not tolerate a system where similarly situated defendants are arbitrarily granted or denied the ability to seek *Hurst* decisions relief based on when their sentences were finalized. The partial retroactivity concept endorsed by *Asay* and *Gaskin* runs afoul of the Eighth and Fourteenth Amendments because it leads to arbitrary results. The extent to which statements in *Mosley* or *Asay* imply that no pre-*Ring* defendant can seek *Hurst* relief, whether under a fundamental fairness approach or a *Witt* analysis would lead to unconstitutional results. The partial retroactivity approach seemingly embraced by *Asay* and *Gaskin* runs afoul of the Eighth and Fourteenth Amendments because it leads to arbitrary results, in this case based solely on when the sentence was finalized.

The United States Constitution does not tolerate the concept of "partial retroactivity", whereby similarly situated

defendants are arbitrarily granted or denied the ability to seek *Hurst* relief based on when their sentences were finalized. The concept of "partial retroactivity" has no basis in this Court's or the United States' Supreme Court's precedent.

The arbitrariness inherent in making the *Hurst* decisions only partially retroactive based on the date *Ring* was decided is illustrated by, among other things, the denial of *Hurst* retroactivity to individuals whose death sentences became final on direct appeal shortly before *Ring,* while at the same time granting *Hurst* relief to other individuals who arrived on death row decades earlier but had been granted new penalty phase proceedings and were resentenced to death post-*Ring*. *See*, section B., p.19 of this Brief. Defendant's whose cases became final in between the issuance of *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), are not entitled to relief, despite the fact that *Ring* flowed directly from *Apprendi*.

The United States Constitution requires that *Hurst* and *Hurst v. State* be applied retroactively because those decisions announced substantive rules. Where a constitutional rule is substantive, the Supremacy Clause of the federal Constitution requires a state post-conviction court to apply it retroactively. Mr. Jones' position is supported from the recent United States Supreme Court decision addressing the retroactivity of the ban on life sentences for juveniles.

In *Montgomery v. Louisiana*, 136 S.Ct. 718, 731-32 (2016), the United States Supreme Court reiterated that where a constitutional rule is substantive (as those announced in the *Hurst* decisions are), the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply that decision retroactively, holding "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." This federal law requirement applies even where a state supreme court is applying a state retroactivity doctrine. In *Montgomery* a Louisiana defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S.Ct. 2455 (2012)(holding the imposition of mandatory life sentences without parole on juveniles violates the Eighth Amendment). The Louisiana Supreme Court held that *Miller* was not retroactive under state retroactivity doctrine, in contrast to this Court's contrary determination in *Falcon v. State*, 162 So.3d 1954 (Fla. 2015). The United States Supreme Court found *Miller* to be substantive, therefore the federal Constitution required it to be applied retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that under

the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. Mr. Jones' position that *Hurst* is substantive is amply supported.

First, in the *Hurst* decisions, the Court held that the Sixth Amendment requires a jury decide whether the aggravating factors have been proved beyond a reasonable doubt, whether they are sufficient to impose the death penalty under the circumstances, and whether they are outweighed by the mitigation. Such findings are manifestly substantive, as the United States Supreme Court has consistently held applied proof-beyond-a reasonable-doubt rules retroactive to *all* defendants. *See, e.g., Ivan V v. City of New York*, 407 U.S. 203, 205 (1972).

The State's argument to the trial court that the *Hurst* decisions are not retroactive because *Ring* was not retroactive overlooks significant distinctions between the two cases.[R25] The decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), which held *Ring* was not retroactive under the federal standard for retroactivity announced in *Teague v. Lane*, 489 U.S. 288 (1989) is inapposite in the *Hurst* context. *Summerlin* did not review a statute like Florida's that required the jury not only to conduct the fact finding regarding the aggravators, but also the fact-finding as to whether the aggravators were sufficient to impose death. *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, Powell v. Delaware*, No. 310, 2016; 2016 WL 7243546 at *3.(Del. Dec. 15, 2016)(holding that *Hurst v. Florida* is retroactive under the state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge v. jury) and not…. the applicable burden of proof.") *See also*, *Guardado v. Jones*, No.4:15-cv-256 (N.D. Fla. May 27, 2016)(federal judge explaining that *Hurst* retroactivity is possible, notwithstanding *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)."

Second, in *Hurst v. State* this Court held the Eighth Amendment requires the jury's fact-finding during penalty phase to be unanimous. 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 the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So.3d at 60-61.("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 rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See Id.* at 61-62. That makes the rule substantive for purposes of federal retroactivity law. *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"), which is true even though the rule's subject concerns 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 to procedural rule."

Welch further illustrates the substantive nature of *Hurst*. *Welch* addressed the retroactivity of the constitutional rule announced in *Johnson v. United States*, 135 S.Ct. 2551, 2560 (2015). In *Johnson*, the Court held the residual clause of the federal Armed Career Criminal Act ["ACCA"], which allowed for a sentencing increase where the defendant had three or more prior convictions for any felony that "involves conduct that presents a serious risk of physical injury to another," was unconstitutional under the Fifth and Fourteenth Amendment's void-for-vagueness doctrine. *Id.,* at 2556. In *Welch* the Court

ruled *Johnson* must be applied retroactively because it announced a substantive, rather than procedural, rule given the invalidation of the ACCA's residual clause "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. *Welch*, 136 S.Ct. at 1265. The Court explained in this context that its determination of whether a constitutional rule is substantive 'does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive, " but whether "the new rule itself has a procedural function or a substantive function- that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.*, at 1266. The Court observed that "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* "*Johnson* establishes, in other words, that even the use of impeccable fact finding procedures could not legitimize a sentence based on that clause. It follows that *Johnson* is a substantive decision." *Id.*(internal quotations omitted).

Under *Welch* the *Hurst* decisions announced substantive rules. In holding the Sixth Amendment requires each element of a Florida death sentence to be found beyond a reasonable doubt,

and that jury unanimity is required to ensure Florida's overall capital system complies with the Eighth Amendment by narrowing the class of death-eligible defendants to those "convicted of the most aggravated and the least mitigated of murder," *Hurst v. State*, 202 So.3d at 50, this Court announced rules that certain murders are "beyond the State's power to punish," *Welch*, 136 S.Ct. at 1265. After *Hurst*, individuals engaging in the same conduct will no longer be subject to the unconstitutional capital sentencing scheme that did not import the beyond-a-reasonable-doubt standard and allowed non-unanimous recommendations to support a death sentence. The language used by this Court in *Hurst v. State*, identifying the fact that the prior unconstitutional sentencing scheme could no longer mandate or authorize any sentence and failed to adequately effectively of narrow the class of murderers subject to the death penalty mirrors *Welch*'s explanation of a substantive rule. *See, Welch*, 136 S.Ct. at 1264-65(a substantive ruled "alters… the class of persons that the law punishes."). Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to all defendants, including Mr. Jones, who were subjected to the unconstitutional sentencing scheme struck down by the *Hurst* decisions.

D. The error in this case is not harmless beyond a reasonable doubt where the jury recommendation was 9-3 and evidence exists demonstrating some jurors' votes for death were premised on a belief of diminished responsibility.

In *Hurst v. State*, this Court held *Hurst* claims are subject to individualized harmless error review. 202 So. 3d at 67-68. ["[T]he burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence."]. The Court has stated it is "rare" for the State to meet its burden. *See, King v. State*, No. SC14-1949, 2017 WL 372081, at *17 (Fla. Jan. 26, 2017). The State must show that no juror would have voted for life in a given case. Where, as here, a juror or jurors have already voted for life, the State cannot make that required showing.

In *Dubose v. State*, SC10-2363, 2017 WL 526506, at *12 (Fla. Feb. 9, 2017), this Court made it clear that "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless." This Court has reversed cases with the identical 9-3 jury recommendation. *See*, *Franklin v. State*, SC13-1632, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016); *Armstrong v. State*, No. Sc14-1967, 2017 WL 224428, at *6 (Fla. Jan. 19, 2017); *Williams v. State*, No. SC14-814, 2017 WL 224529, at *18-

19 (Fla. Jan. 19, 2017); *Hogan v. State*, SC13-5, 2017 WL 410215, at*3 (Fla. Jan. 31, 2017).

It is clear that the courts may not speculate that, absent *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. Engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So.3d at 69. In this case such speculation would be particularly egregious given the comments reported in the press of three jurors who voted for death and who did so, in part, because they believed their votes were not significant because the trial judge would be the ultimate determiner of the sentence to impose. *Jones v. State*, 928 So.2d 1178, 1191 (Fl. 2006)[reporting the juror's statements appearing in the *Florida Times-Union*].

The State's argument to the trial court [R25-26] that the existence of the prior violent felony aggravator based on the contemporaneous felony conviction salvages the prior proceeding has been rejected by this Court. *See*, *Franklin v. State*, 2016 WL 6901498, at *6 (rejecting "the State's contention that Franklin's convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*.");

McGirth v. State, 2017 WL 372095, at *2 (Fla. Jan. 26, 2017)[contemporaneous felony]; *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)[contemporaneous felony].

Even if this Court's precedent allowed *Hurst* errors to be harmless in cases with less than a unanimous jury recommendation, the State still could not show the error in Mr. Jones' case was harmless beyond a reasonable doubt. First, there is no reason to believe that in a constitutional setting, the three jurors who voted for life would have voted for death. In fact, it is *more likely* that additional jurors would have voted for life if they had not believed their vote was diminished or if they had been properly instructed the vote they cast would be the determinant sentencing decision. *See¸ Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id.* at 328-29. The United States Supreme Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility, and that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led

to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.*, at 328-29,341 (internal quotation omitted).

Mr. Jones' jury was led to believe that its rule in sentencing was diminished when the trial court instructed it that its sentence was advisory. It was with these instructions in mind, which informed Mr. Jones' jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere", *Id.*, at 328-9, that the jurors rendered a 9-3 vote to impose the death penalty. The media interviews of three of the jurors who voted for death confirms this is exactly what happened in Mr. Jones' case.

The media interviews of the at least three jurors who voted for death bears out the likelihood that at least three additional jurors would have voted for life, if properly instructed, leading to a then 6-6 vote, at minimum, which would have mandated a life sentence even under the unconstitutional system. It is probable the jury would have returned a different recommendation had they had the correct understanding of their responsibility.

Second, if Mr. Jones' counsel at trial had not been influenced in his decision making by the statutory framework struck down in the *Hurst* decisions, a different approach to penalty phase could certainly have been taken, including broader

challenges to the aggravation and a broader presentation of mitigation. Trial counsel’s approach may have differed as early as jury selection. He may have conducted his question differently had he known the jury would make the sentencing determination and only one juror need vote for a life sentence in order to avoid a death sentence. Trial counsel’s approach to both mitigation and aggravation may well have been different as well, had counsel known the jury could still sentence a defendant to life even if all the elements necessary for a death sentence were satisfied.

The postconviction proceedings in this case alleged trial counsel was deficient in failing to present available mitigation testimony, including the testimony of a mental health expert, additional mental health testimony, and additional mitigating evidence from family, friends, and co-workers. This additional testimony, when presented in a constitutionally sound sentencing framework with a properly instructed jury would more than likely resulted in even more votes for a life sentence. Even without additional mitigation, the jury’s consideration of the mitigation in this case may have been significantly impacted by the jury’s knowledge it was not the ultimate sentence. The juror interviews in the newspaper bear out this conclusion. It is likely that in a constitutional proceeding a jury may have afforded even greater weight to the mitigation in this case.

Thus, the State cannot establish harmless error in this case in light of the absence of constitutionally required findings by the jury, the evidence already in the record which casts doubt on the juror's votes for death, and the 9-3 recommendation.

ISSUE II

MR. JONES MUST BE SENTENCED TO LIFE IN PRISON

Mr. Jones recognizes this Court rejected the argument that Section 775.082(5) applies to defendants sentenced to death by mandating a life sentence. *See*, *Hurst v. State*, 202 So.3d at 75-76 [Perry, J., dissenting]. Mr. Jones urges this Court to reconsider this position and adopt the dissenting view expressed by Justice Perry in *Hurst v. Florida* for the reasons articulated therein.

CONCLUSION

Based on the forgoing citations of law, other authorities, and the arguments contained herein, Mr. Jones respectfully requests the *Hurst* decisions be applied retroactively to his case and his sentence of death be vacated.

Respectfully submitted,

/s/Robert A. Norgard
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the forgoing Initial Brief has been furnished electronically to the Office of the Attorney General, Capapp@myfloridalegal.com this 26th day of May, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Initial Brief is Courier New 12 point in conformance with Fla. R. App. P. 9.210.

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