No. SC17-552

In the
Supreme Court of Florida

CARL PUIATTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PASCO COUNTY, FLORIDA

APPELLANT'S BRIEF IN RESPONSE TO SEPTEMBER 25, 2017 ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Appellant Carl Puiatti has been condemned to die under a sentence imposed in violation of the constitutions of the United States of America and the State of Florida. There is no dispute about this. In *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst I*"), the U.S. Supreme Court held that a death sentence is unconstitutional when, as here, the trial judge rather than the jury makes "the critical findings necessary to impose the death penalty." *Id.* at 622. And under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), Puiatti's death sentence, imposed on a non-unanimous (11-1) jury recommendation, violates the federal and Florida constitutions because the jury did not unanimously find any of the requisite factual predicates or render a unanimous verdict. *Id.* at 44. These serious constitutional errors were not harmless beyond a reasonable doubt; indeed, this Court has never found a *Hurst* error harmless in a non-unanimous case.

Nonetheless, the Circuit Court below held that Puiatti's unconstitutional death sentence should stand because the *Hurst* decisions do not apply retroactively to him. That holding was erroneous, and nothing in *Hitchcock v. State*, --- So. 3d ---, 2017 WL 3431500 (Fla. Aug. 10, 2017), weighs in favor of affirmance.

First, Puiatti's death sentence became final, if at all, after *Ring v. Arizona*, 536 U.S. 584 (2002), and this Court has held that *Hurst* categorically applies retroactively to all such defendants. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla.

2016). *Hitchcock*, a pre-*Ring* case, therefore has no bearing here.

Second, even if Puiatti's death sentence were final before *Ring*, the *Hurst* decisions apply retroactively to him under the "fundamental fairness" test reaffirmed in *Mosley* (*id.* at 1274–75) because Puiatti raised *Hurst* arguments throughout this case, from pre-trial to post-conviction. Neither *Hitchcock* nor *Asay v. State*, 210 So. 3d 1 (Fla. 2016), on which *Hitchcock* relied, considered the fundamental fairness test, so neither case demands affirmance here.

Third, the *Hurst* cases—in particular, *Hurst II*—announce either new substantive rules or "watershed" procedural rules that apply retroactively under federal law. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). This Court has not addressed the retroactivity of *Hurst I* or *II* under federal law—not in *Hitchcock* and not in *Asay*—although it must under the Supremacy Clause. *See id*. at 731–32.

Finally, cutting off *Hurst* relief to Puiatti based solely on a finding that his sentence became final before 2002 would violate the Sixth, Eighth and Fourteenth Amendments, as unconstitutionally arbitrary and capricious, and inconsistent with the guarantees of equal protection and due process.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal raises critically important issues, including questions of first impression, relating to the retroactivity of the *Hurst* decisions under state and federal law. Given the importance of these issues and the fact that a life is at stake,

Puiatti respectfully requests oral argument. Puiatti also requests an opportunity to brief these fundamentally important issues in full, in accordance with the standard rules of appellate practice. Many of the core questions presented here have not been presented to this Court, much less decided by *Hitchcock* or any other appeal. Moreover, depriving Puiatti the opportunity for full briefing would be an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015); *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); Fla. R. App. P. 9.210(a)(5)(D).

ARGUMENT

I. THE *HURST* DECISIONS APPLY TO PUIATTI UNDER *MOSLEY* BECAUSE HIS SENTENCE WAS FINAL, IF AT ALL, AFTER *RING*

This Court held in *Mosley* that, at a minimum, all defendants whose sentences were final after *Ring* get the benefit of the *Hurst* decisions. *See Mosely*, 209 So. 3d at 1283. *Hitchcock*, of course, did not alter this holding because the Court found that Hitchcock was a pre-*Ring* defendant. *See* 2017 WL 3431500, at *1. For two reasons, Puiatti should get the benefit of the *Hurst* cases under *Mosley* because his sentence became final, if at all, only after *Ring*.

A. Puiatti's Sentence Was Vacated in 2009 and Reimposed Post-*Ring*

In August 2009, the U.S. District Court for the Middle District of Florida granted in part Puiatti's federal habeas petition and vacated his death sentence. *See*

Puiatti v. Sec'y Dep't of Corr., 651 F. Supp. 2d 1286, 1319 (M.D. Fla. 2009) ("Petitioner's sentence of death is VACATED."). At that point, Puiatti was no longer subject to a death sentence. The State took an appeal, but it did not move for a stay of the district court's judgment pending appeal. *SEC v. Torchia*, 2017 WL 839678, at *1 (N.D. Ga. Mar. 2, 2017). Accordingly, during the pendency of the appeal, Puiatti was without a death sentence. In November 2010, the Eleventh Circuit reversed the district court's decision. *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010). Puiatti filed a certiorari petition, and, unlike the State, also received a stay pending the disposition of that petition. *See* Order, *Puiatti v. Sec'y Dep't of Corr.*, No. 8:92-cv-589 (M.D. Fla. Feb. 8, 2011) (ECF No. 134). Puiatti's sentence remained vacated during the Supreme Court proceedings. The Supreme Court ultimately denied the petition in June 2011, *see Puiatti v. Buss*, 564 U.S. 1046 (2011), but that denial only re-imposed the death sentence. It did not undo the fact that Puiatti's sentence had been vacated between August 2009 and June 2011. Puiatti's operative death sentence was therefore imposed in 2011, well after *Ring*.

The Circuit Court disagreed, holding that Puiatti's sentence was final in 1988 when the U.S. Supreme Court denied certiorari from his direct appeal. SPCR.401 (citing Fla. R. Crim. P. 3.851(d)(1)). But, even under Section 3.851(d)(1)(B), Puiatti's latest sentence became final in 2011, when the U.S. Supreme Court denied certiorari. Because the district court vacated Puiatti's

sentence, and that order was never stayed, Puiatti was without a death sentence for a period of time. Only when the Eleventh Circuit re-imposed the death sentence, and the U.S. Supreme Court denied certiorari, did Puiatti's sentence became final.

B. Puiatti's Judgment Is Not Signed and Is Not Effective

Puiatti also should get the benefit of the *Hurst* decisions because there is no currently effective and valid judgment as to his conviction. The Florida Statutes require that a judge certify the judgment of conviction and sentence on the appropriate places on the judgment form. *See* § 921.241, Fla. Stat. ("Every judgment of guilty or not guilty of a felony shall be in writing, signed by the judge, and recorded by the clerk of the court."). Puiatti's judgment does not comport with that requirement because the place on the form for the judge's signature certifying the guilty judgment is blank. *See* SPCR.113.

The judge did certify Puiatti's fingerprints, a separate Section 921.241 requirement. But a fingerprint certification is not enough to comply with the statute and to make the judgment effective. *See Watford v. State*, 353 So. 2d 1263 (Fla. 1st DCA 1978). In *Watford*, the "trial judge certified as to defendant's fingerprints but not to the judgment and sentence as required by section 921.241(1), Florida Statutes." *Id.* at 1264. So, *Watford* was remanded "for the purpose of imposing judgment and sentence in the manner and form required by Section 921.241, Florida Statutes." *Id.* at 1265; *see also Nevels v. State*, 6 So. 3d 117 (Fla. 4th DCA

2009) (remanding to enter a judgment consistent with Section 921.241); *Ramos v. State*, 429 So. 2d 318 (Fla. 2d DCA 1981) (same); *Bunting v. State*, 361 So. 2d 810, 811 (Fla. 4th DCA 1978) (same).

The Circuit Court held that, notwithstanding *Watford*, the judge's failure to sign Puiatti's judgment of conviction "does not suggest that a conviction or sentence is invalid." SPCR.401–02. But the case law is to the contrary. In *Gray v. State*, the court held that a document's failure to comply with the requirements of Section 921.241 are not merely ministerial errors, but instead mean that the form "does not constitute a judgment or a sentence" at all. 198 So. 3d 780, 783 (Fla. 2d DCA 2016). Thus, the trial court's failure here to enter a judgment in conformity with Section 921.241 means that there is no effective valid final judgment as to Puiatti's conviction. *See id.* As in *Watford* and the cases cited above, the court must enter a new judgment consistent with the statute. *See Edwards v. State*, 422 So. 2d 24 (Fla. 2d DCA 1982) (affirming conviction, but vacating judgment and remanding for entry of a new judgment in conformity with Section 921.241).

Any judgment imposed now would be post-*Ring*—indeed, post-*Hurst*. To the extent the State argues that this is a clerical error and Puiatti should not get the benefit of the *Hurst* decisions on account of it, such a result would be no more arbitrary than granting a petitioner initially sentenced pre-*Ring*, but resentenced post-*Ring*, the benefit of *Hurst*—a result this Court has endorsed. *See infra* p. 18.

II. THE *HURST* CASES APPLY RETROACTIVELY TO PUIATTI AS A MATTER OF FLORIDA LAW

Even if Puiatti's sentence were final before *Ring*, the *Hurst* decisions apply retroactively to him. *Mosley* confirmed that a decision of the U.S. Supreme Court or this Court will be given retroactive effect under *either* of two separate tests: (1) the "fundamental fairness" doctrine, such as that applied in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993); *or* (2) under *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). *See Mosley*, 209 So. 3d at 1275–76 & n.13. These are independent avenues for the retroactive application of a new constitutional decision and satisfying either test alone is sufficient. *Id*. The *Hurst* decisions should apply retroactively to Puiatti under both. *Hitchcock* does not change this analysis because it considered neither the fundamental fairness analysis, nor the application of *Hurst II* under *Witt*.

A. Fundamental Fairness "Alone" Requires Retroactive Application

Mosley held that "fundamental fairness *alone* may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes this Court's jurisprudence." *Mosley*, 209 So. 3d at 1274–75 (emphasis added). Using *James v. State* as an illustrative example, the Court held that one such circumstance is when a defendant consistently raised a constitutional claim that the U.S. Supreme Court (or this Court) ultimately vindicates. *Id. Mosley* thus held that when a defendant raised *Ring*- and *Hurst*-like challenges before those cases were decided, "fundamental

fairness requires the retroactive application of *Hurst*." *Id.* at 1275. Here, from trial through collateral review, Puiatti raised the same Sixth and Eighth Amendment challenges ultimately "validated" in the *Hurst* cases.

- In his initial habeas petition in this Court, before *Ring* was decided, Puiatti argued that "Further, given the non-unanimous jury verdict on penalty, Puiatti was denied his right to a unanimous verdict on all of the elements of the offense." SPCR.165. This is exactly the right ultimately vindicated in *Hurst II*. *See* 202 So. 3d at 53–54.

- In a pre-trial motion to dismiss the indictment, Puiatti argued that Florida's death penalty scheme was unconstitutional because it involved undue "jury discretion, both as to the verdict and as to the advisory sentence" and undue "discretion of the trial court in sentencing." SPCR.267. Both *Hurst I* and *Hurst II* held that the Florida capital sentencing scheme was unconstitutional for the same reason: vesting too much discretion in the judge rather than the jury. *Hurst I*, 136 S. Ct. at 621–22; *Hurst II*, 202 So. 3d at 53–54.

- In a motion to dismiss the indictment, Puiatti argued that the Florida sentencing scheme violated the Sixth Amendment because it gave the "jury unbridled discretion in determining whether or not to recommend a death sentence and *the trial judge's unlimited discretion in determining whether or not to impose a sentence of death*." SPCR.270 (emphasis added). The *Hurst* cases recognized these same principles. *Hurst I*, 136 S. Ct. at 621–22; *Hurst II*, 202 So. 3d at 53–54.

- In a pre-trial demurrer to the indictment, Puiatti argued that the trial judge's discretion to impose the sentence (and override a jury recommendation to life) violates the Eighth Amendment, among others: "Section 921.141, in allowing the judge to overrule the jury's recommendation of a life sentence, violates the Defendant's right to due process, right to be free from double jeopardy and right to be free from cruel and unusual punishment." SPCR.278. These are the same principles vindicated in the *Hurst* decisions. *See Hurst I*, 136 S. Ct. at 621–22; *Hurst II*, 202 So. 3d at 53–54.

- In the pre-trial demurrer, Puiatti also argued that the jury's role in sentencing should be primary: "the jury's recommendation constitutes the single most important indicator of whether the death penalty comports with community

standards of decency in a given case." SCPR.283. "Since juries are the conscience of our communities, a jury recommendation of life imprisonment reflects a determination that the death sentence does not comport with contemporary community standards in a particular case. To impose the death penalty in disregard of such a jury determination constitutes cruel and unusual punishment and violates the Eighth and Fourteenth Amendments." *Id. Hurst II* recognized these very principles. 202 So. 3d at 60.

- Puiatti also argued in the pre-trial demurrer that his due process rights were violated because the jury was never required to identify which of the aggravating factors were found, and thus neither the court nor the defendant "can ever know the basis for the jury's recommendation." SPCR.286. *Hurst I* also recognized this fundamental flaw. *See Hurst I*, 136 S. Ct. at 621–22.

- Shortly after *Ring*, Puiatti brought a Rule 3.851 motion seeking relief under *Ring*. *See* SCPR.288–337. That motion was denied on the merits by the circuit court based on then-existing law. *See* SCPR.388–51.

- Puiatti raised claims under *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985), a *Hurst*-like claim that the judge diminished the jury's role in sentencing by suggesting that "responsibility for determining the appropriateness of defendant's death sentence rests elsewhere." Counsel requested instructions consistent with *Caldwell*, SCPR.353; that request was denied, and the judge told the jury that its role was "advisory" and "the final decision as to what punishment shall be imposed is the responsibility of the judge." SPCR.357.

- Puiatti further argued that the court's instructions in this regard violated *Caldwell*. SCPR.377–80. And, in his state habeas petition, Puiatti argued that the trial court's failure to give an instruction consistent with *Caldwell* "violates the Eighth Amendment because it undermines the reliability of the sentencing determination." SCPR.135–36; SPCR.198–204. *Hurst II* recognized this same principle in emphasizing the role of unanimity in rendering reliable verdicts. 202 So. 3d at 60.

Hitchcock, which said nothing about the fundamental fairness test, does not change this analysis. *See* 2017 WL 3431500, at *1 n.2 (listing claims Hitchcock raised, none of which were fundamental fairness); *see also id.* at *2 (Lewis, J.,

concurring, observing that fundamental fairness was unavailable to Hitchcock). And *Asay*, on which *Hitchcock* relied, also did not consider the fundamental fairness test. *Asay* decided only whether *Hurst I* should apply retroactively under *Witt*. *Asay*, 210 So. 3d at 16 ("[T]his Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*."). Asay did not raise a fundamental fairness claim, so this Court had no reason to address it. *See Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007) (arguments not raised in the initial brief are barred). Moreover, such relief would have been unavailable to Asay. *See Asay*, 210 So. 3d at 11 & n.12.

In short, *Mosley* confirmed that "fundamental fairness *alone*" is sufficient, and *Mosley* expressly distinguished it from the *Witt* test. 209 So. 3d at 1274–76 & n.13. Moreover, the fundamental fairness test would be wholly superfluous if it applied only when a defendant also satisfied *Witt*. *Witt* applies categorically to any defendant who falls within the "retroactivity period" regardless of whether he raised the issue. *Id.* That being so, the fundamental fairness test would serve no purpose if the only defendants it applies to are those who get the benefit of retroactivity under *Witt*, anyway.

B. *Hurst II* Applies Retroactively to Puiatti Under the *Witt* Analysis

Puiatti is also entitled to the retroactive application of *Hurst II*—which recognized the Eighth Amendment and Florida Constitutional right to a unanimous jury recommendation—under *Witt*. In *Hitchcock*, this Court denied relief, relying

on *Asay* (*see* 2017 WL 3431500, at *2), but *Asay* did not decide, and had no occasion to decide, whether the separate constitutional right to a unanimous jury verdict recognized in *Hurst II* should apply retroactively. *Id.* at *4 (Pariente, J., dissenting); *Asay*, 210 So. 3d at 10 (Asay raised judge fact-finding claims, not unanimity).[2] Thus, *Hitchcock*, insofar as it relied on *Asay*, does not foreclose relief.

Witt demonstrates that the *Hurst II* jury unanimity rule constitutes a "development of fundamental significance" and should be held retroactive. *Witt*, 387 So. 2d at 931.[3] *First*, this Court held in *Mosley* that the principles vindicated in *Hurst II* "weigh[] heavily in favor of retroactive application." *Mosley*, 209 So. 3d at 1278. *Second*, the extent of reliance prong, which balances "the extent to which a condemned practice infect[ed] the integrity of the truth-determining process" against the judicial system's reliance on the old rule, *Stovall v. Denno*, 388 U.S. 293, 298 (1967), also weighs in favor of retroactive application. Jury unanimity serves as a vital protection in securing the "integrity of the truth-determining process," as this Court recognized in *Hurst II*. *See* 202 So. 3d at 58 (quoting *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy,

[2] *Id.* at 11 (same); *id.* at 15 (same). Asay did not raise a *Hurst II* claim for the right to jury unanimity. Briefing in *Asay* ended on May 19, 2016, but this Court did not publish *Hurst II* until October 14, and Asay did not submit supplemental briefing.

[3] *Hurst* meets the other factors: the rule (1) emanates from a decision of the U.S. Supreme Court or this Court; and (2) is constitutional. *Mosley*, 209 So. 3d at 1276.

J.)); *State v. Gaiter*, 2016 WL 2626005, at *6 (Fla. 11th Cir. Ct. May 9, 2016).[4]

Third, the impact on judicial administration of applying *Hurst II* retroactively weighs in favor of retroactive application because it would not "destroy the stability of the law." *Mosley*, 209 So. 3d at 1281. "[N]o defendant will receive a new guilt phase or be released from prison while a new penalty phase takes place"; not every defendant to whom *Hurst* applies receives relief because *Hurst* errors are subject to harmless error review; and the *Hurst* decisions do not affect those "cases where the defendant waived his/her right to a trial by jury." *Id.* at 1281–82. Applying *Hurst II* to the approximately 175 pre-*Ring* defendants would not grind the judicial process to a halt.[5]

III. FEDERAL LAW REQUIRES RETROACTIVE APPLICATION

The *Hurst* cases apply retroactively to Puiatti under federal law. "[W]hen a

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[4] Further, *Hurst II* noted that the State was on notice for decades that the majority-vote rule could be unconstitutional. *Hurst II*, 202 So. 3d at 59 (citing *State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005)); *see also Andres v. United States*, 333 U.S. 740, 749 (1948); *Connecticut v. Daniels*, 542 A.2d 306, 315 (Conn. 1988).

[5] Courts have held retroactive decisions that have far greater impact than 175 cases. *Montgomery* held that *Miller v. Alabama*, 567 U.S. 460 (2012) applies retroactively, 136 S. Ct. at 736, a decision that affects 2,300 cases. *See* John R. Mills, *No Hope: Re-Examining Lifetime Sentences for Juvenile Defenders*, The Phillips Black Project, http://www.phillipsblack.org/s/JLWOP-2.pdf (last visited May 11, 2017). *Johnson v. United States*, 135 S. Ct. 2551 (2015) also applies retroactively, *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), affecting 4,000 defendants sentenced between 2008 and 2014 alone. *See* Br. of the Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 50, *Welch v. United States*, 136 S. Ct. 1257 (2016) (No. 15-6418).

new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. 718. This is so even if the state's retroactivity law would lead to a different result. *Id.* at 731–32. *Hitchcock* did not apply federal law.

A. The *Hurst* Decisions Announce New Substantive Rules

State courts must apply new substantive rules retroactively because "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id*. at 731. A "substantive" rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Id*. at 729.

Hurst II announced two substantive rules. *First*, the Sixth Amendment requires that a jury find, beyond a reasonable doubt, the critical facts necessary to impose a death sentence. *Hurst II*, 202 So. 3d at 44. This Sixth Amendment right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004). It requires that the community—not the judge—make the ultimate determination that death is the appropriate punishment. The requirement that these findings be made "beyond a reasonable doubt" also is a standard of proof that conveys protections that apply retroactively. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, *Hurst II* held that under the Eighth Amendment and the Florida Constitution, a defendant cannot be sentenced to death except on the unanimous recommendation of the jury. *Hurst II*, 202 So. 3d at 44, 53–54. This is a substantive rule, rooted in the guarantees of the Eighth Amendment, that "prohibit[s] a certain category of punishment for a certain class of defendants because of their status or offense." *Montgomery*, 136 S. Ct. at 729. Specifically, the jury unanimity rule "narrow[s] the class of murderers subject to capital punishment." *Hurst II*, 202 So. 3d at 60. The rule means that a defendant is *ineligible* for the death penalty unless jurors, reflecting the values of the community, unanimously conclude that the crime is among the "most aggravated and least mitigated of murders." *Id.* This amounts to a substantive change in the elements of the underlying offense, as the recent legislative amendments make clear. *See* § 921.141(2)(c), Fla. Stat.

Further, this Court imposed the rule of jury unanimity not as a procedural regulation, but as a substantive component of the Eighth Amendment. Jury unanimity ensures that Florida's capital sentencing comports with the "evolving standards of decency" in light of the contemporary consensus. *Hurst II*, 202 So. 3d at 61–62 ("[C]ontemporary values demand a defendant not be put to death except on the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances."). This ensures that "the

State's power to punish is exercised within the limits of civilized standards." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976); *Hurst II*, 202 So. 3d at 61.

Schriro v. Summerlin, 542 U.S. 348, 364 (2004) is not to the contrary. There, the Court held that *Ring* did not apply retroactively because it announced a procedural rule. But *Hurst II* is not *Ring*; it is broader. Among other things, *Ring* addressed only whether the jury must make the requisite factual findings. *Ring*, 536 U.S. at 609. *Ring* did not require, as *Hurst II* does, that the jury make the ultimate recommendation to impose the death sentence, or jury unanimity. *See Schriro*, 542 U.S. at 360 (Breyer, J., dissenting) (making this distinction).[6]

B. Alternatively, if Procedural, the *Hurst* Decisions—in Particular *Hurst II*—Announce Watershed Rules

If the *Hurst* decisions announce procedural rules, then they are "watershed" rules that "implicate[] the fundamental fairness and accuracy of the criminal proceeding," and apply retroactively under *Teague*. *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The *Hurst* decisions qualify as "watershed" rules because they (1) are "necessary to prevent an impermissibly large risk of an inaccurate conviction"; and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

[6] Nor did *Ring* consider a sentencing scheme, like Florida's, that imposed a beyond a reasonable doubt standard, a requirement that is substantive. *See Ivan V.*, 407 U.S. at 205; *see also Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016), ECF No. 20; *Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

First, the requirement that a jury votes unanimously to recommend a death sentence stands as a fundamental bulwark against "an impermissibly large risk of an inaccurate [sentence]." *Id.*; *see also Sawyer v. Smith*, 497 U.S. 227, 244 (1990) (A rule is a "watershed" rule in capital sentencing when it is "central to an accurate determination" that death is the appropriate punishment). The capital sentencing jury performs the vital "narrowing function" to ensure that the death penalty is imposed only on "the most culpable of murderers and for the most aggravated of murders." *Hurst II*, 202 So. 3d at 60. A unanimous jury ensures that juries get it right, "provid[ing] the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." *Id.*

Second, the unanimous jury requirement alters the "bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 420 (citations omitted). The requirement is part of longstanding Anglo-American jurisprudence, "reaching back centuries." *Hurst II*, 202 So. 3d at 54 (citing 4 William Blackstone, Commentaries *349–50). The principle "under the common law" that "jury verdicts shall be unanimous was recognized by this Court very early in Florida's history." *Id.* at 55 (citing *Matter to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859)). "Florida has always required jury verdicts to be unanimous on the elements of criminal offenses." *Id*. at 55–56. Notwithstanding all this, Florida never extended this bedrock protection to the capital penalty phase.

Hurst II "altered" our understanding of this bedrock rule by extending it to the jury's recommendation at capital sentencing for the first time.

IV. ANY CONCEPT OF PARTIAL RETROACTIVITY WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Holding the *Hurst* cases retroactive based solely on when a defendant's sentence is final would be arbitrary and capricious in violation of the Eighth and Fourteenth Amendments, and would violate equal protection and due process. The court below found this argument "compelling," but did not grant relief because this Court had not yet endorsed it. SPCR.404. This Court can do so now.

A core substantive component of the Eighth and Fourteenth Amendments is that a death sentence cannot be arbitrarily imposed. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (The death penalty cannot be imposed under procedures that "create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

A scheme where similarly situated defendants get the benefit of a constitutional right based on the happenstance of when a sentence becomes final does not comport with this requirement. Finality depends on arbitrary factors: delays in transmitting the appellate record; extensions of time to file briefs; this Court's summer recess; how long this Court takes to release opinions; whether a rehearing motion is filed; whether a corrected opinion issues; whether a certiorari

petition is filed or an extension sought; and how long a petition remains pending.

The pure arbitrariness of such a scheme—in which defendants who commit crimes on the same day get different treatment—is illustrated by this Court's cases. This Court affirmed Gary Bowles' and James Card's unrelated death sentences on the same day, October 11, 2001. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both petitioned for certiorari. Card's petition was denied on June 28, 2002, four days after *Ring*. *Card v. Florida*, 536 U.S. 963 (2002). He received *Hurst* relief. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). But Bowles's petition was denied on June 17, 2002, seven days before *Ring*, *Bowles v. Florida*, 536 U.S. 930 (2002), on the other side of the Court's cutoff.

Likewise, defendants who committed crimes years *before* Puiatti get *Hurst* relief. Card, as noted above, committed his crime in 1981—two years before Puiatti. *Card*, 803 So. 2d at 617; *see also Johnson v. State*, 205 So. 3d 1285, 1288–89 (Fla. 2016) (crime committed in 1981).[7] Only the idiosyncrasies of the defendants' post-conviction fortunes explain why these defendants get *Hurst* relief and Puiatti does not. The Eighth and Fourteenth Amendments do not tolerate such arbitrary distinctions. *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) ("The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the

[7] *See also Meeks v. Moore*, 216 F.3d 951 (11th Cir. 2000) (original conviction in 1974); *State v. Dougan*, 202 So. 3d 363 (Fla. 2016) (same); *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015) (same, 1984).

rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively.").

A retroactivity cutoff also violates equal protection, treating similarly situated defendants differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes receive different treatment, the question is "whether there is some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Distinctions impinging upon fundamental rights, like the right to a reliable sentencing determination (*Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), are strictly scrutinized. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). But a *Hurst* cutoff lacks even a rational connection to a legitimate state interest. *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

Denying the benefit of *Hurst* to Puiatti also violates due process because once a state requires certain sentencing procedures, it creates life and liberty interests in those procedures.[8] There is no rational reason to deny Puiatti the constitutional protections extended to other prisoners in the *Hurst* cases.

V. THE *HURST* ERRORS HERE WERE NOT HARMLESS

Hurst errors occurred here: the jury did not make the required factual

[8] *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Hicks*, 447 U.S. 346; *Ford v. Wainwright*, 477 U.S. 399, 427–31 (1986) (O'Connor, J., concurring); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring).

findings and its 11-1 death recommendation was not unanimous. *Hurst II*, 202 So. 3d at 53–54. These errors were not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). "[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of any aggravating and mitigating circumstances. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017). The logic is clear: on the evidence presented, twelve jurors did not agree that a death sentence is warranted. *See Card*, 219 So. 3d at 48. This Court has never found harmless error in a non-unanimous case.

Moreover, there was evidence from which the jury could conclude that the mitigation outweighed any aggravating factors.[9] Puiatti presented evidence that he acted under the substantial domination of his co-defendant. The *judge* discounted this evidence by weighing competing expert testimony and making credibility determinations—the province of the jury. But the jury may have reached different conclusions. So, too, with Puiatti's age, a mitigating circumstance the *judge* dismissed as entitled to little weight; the jury may have reached a different result.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Circuit Court and remand with instructions to vacate Puiatti's death sentence.

[9] Moreover, in light of *Caldwell*, harmless error could not apply here given jury instructions that unconstitutionally minimized its role in the sentencing process, making it impossible to speculate what an appropriately instructed jury would find.

Dated: October 16, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, the foregoing was served via the e-portal to the Senior Assistant Attorney General Scott Browne at scott.browne@myfloridalegal.com and Assistant State Attorneys Manuel Garcia and Damien Kraebel at mgarcia@co.pinellas.fl.us and dkraebel@co.pinellas.fl.us/.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fla. R. App. P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

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