IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-589

HAROLD GENE LUCAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Lucas lives or dies. This Court has allowed argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Lucas.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. Art. V. § 3(b)(1); *Orange v. Williams, 702 So.2d 1245 (Fla. 1997).*

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are from the transcript and of the form (R p. 123). Any references to the supplemental record of the direct appeal are of the form (SR page#). References to the original postconviction record on appeal are in the form, e.g. (Vol. I PCR. 123). References to the successive record on appeal are in the form (Vol. I SPCR 123). Generally, Harold Lucas is referred to as Mr. Lucas throughout this brief. The Office of the Capital Collateral Regional Counsel- Middle Region, representing the

Appellant, is shortened to "CCRC."

State of the Facts and Procedural History

Mr. Lucas was indicted on August 30, 1976 and charged with one count of first degree premeditated murder and two counts of attempted first degree murder for the August 14, 1976 shootings of Jill Piper, Richard Byrd and Terri Rice in Bonita Springs, Florida. Piper was fatally wounded; Byrd and Rice survived.

Following a trial held in 1977, Mr. Lucas was found guilty as charged. The jury recommended a sentence of death and on February 9, 1977, the trial court imposed a sentence in accordance with the recommendation. Mr. Lucas was also sentenced to thirty years imprisonment on each of the two convictions for attempted murder with all sentences to run consecutively.

On direct appeal, the Florida Supreme Court upheld the conviction but remanded the case for resentencing on the ground that the trial court erred in considering as a non-statutory aggravating factor the heinous and atrocious nature of the attempted murders of Piper's companions. *Lucas v. State*, 376 So.2d 1149 (Fla. 1979) (*Lucas I*).

On remand, the trial court again sentenced Mr. Lucas to death. On direct appeal, the Florida Supreme Court determined that the trial court did not properly reweigh and

reevaluate aggravating and mitigating circumstances in imposing the death penalty. The Supreme Court vacated the death penalty and remanded the case to the trial judge to conduct a new sentencing proceeding. *Lucas v. State*, 417 So.2d 250 (Fla. 1982) (*Lucas II*). On remand, the court again sentenced Mr. Lucas to death and appeal was taken.

On appeal for the third time, the Florida Supreme Court ruled that there should be a complete new sentencing proceeding before a newly impaneled jury. *Lucas v. State*, 490 So.2d 943 (Fla. 1986) (*Lucas* III).

On remand from *Lucas* III, a second penalty phase trial was held in 1987. The jury again recommended a sentence of death by a vote of **eleven to one** on April 3, 1987. (R p. 807, 888). The trial court again followed the jury's recommendation.

This sentence was appealed to the Florida Supreme Court and was reversed and remanded for another resentencing without empaneling a jury. *Lucas v. State*, 568 So.2d 18 (Fla. 1990). (*Lucas IV*). On remand, the trial court again sentenced Mr. Lucas to death. The court found two aggravating circumstances: (1) the prior conviction for a felony involving use or threat of violence to persons, and (2) the heinous, atrocious, or cruel nature of the crime. The court also found numerous mitigating circumstances. The order was affirmed on direct appeal. *Lucas v. State*, 613 So.2d 408 (Fla. 1992) (*Lucas V*).

The prior appeals are relevant to the arguments raised in this brief. Lucas raised multiple claims in multiple appeals, concerning how the trial court erred in ruling. The Florida Supreme Court ruled as follows:

> ***Lucas I:***
> (1) defendant was not entitled to any relief as result of State's introduction of testimony of an unlisted rebuttal witness in violation of applicable rule where defense counsel, who brought State's noncompliance to trial court's attention, failed to interpose an objection;
> (2) although defendant's two convictions for attempted first-degree murder were entered contemporaneously with his conviction for first-degree murder, both were entered previous to sentencing and were therefore appropriately considered by trial judge as an aggravating circumstance, and
> (3) finding that attempted murders of victim's companions were heinous and atrocious was a nonstatutory aggravating factor and should not have been considered.
> Conviction affirmed; remanded for resentencing.
>
> ***Lucas II:***
> The Florida Supreme Court again reversed and remanded for an additional sentencing hearing where trial judge did not properly reweigh and reevaluate valid aggravating and mitigating circumstances in imposing death penalty.
>
> ***Lucas III:***
>
> (1) on remand for a new sentencing proceeding, both sides should have been allowed to present additional testimony and argument;
> (2) there should be a complete new sentencing proceeding before newly empaneled jury where trial occurred before decision holding that mitigating factors were not restricted to those listed in statute; and

(3) aggravating factor of creating great risk of death to many people was not applicable absent evidence that defendant's conduct endangered more than the three people directly involved.
Remanded for new sentencing proceeding.

***Lucas IV*:**
(1) trial court properly instructed jury on consideration of mitigating evidence;
(2) prosecutor's remark that defendant knew right from wrong was a fair comment;
(3) testimony of victims who survived attack did not unduly prejudice defendant;

(4) State could present hearsay evidence in the penalty proceeding;

(5) victim's drug use was not relevant to defendant's character and record or circumstances of the crime; and

(6) remand was required for reconsideration and rewriting of findings of fact.

Lucas V:

(1) defendant was not entitled upon remand to present testimony from additional witnesses and to have a presentence investigation report prepared;

(2) the trial court did not disregard possible mitigators; and

(3) death sentence was a proportionate penalty for murder.

The judgment and sentence for first degree murder in this case were ultimately affirmed on appeal by the Florida Supreme Court on December 24, 1992. *Lucas v. State (Lucas V)*, 613 So.2d 408 (Fla. 1992).

Mr. Lucas filed motions for postconviction relief under Fla.R.Crim.P. 3.850 on October 3, 1994, August 22, 1995, October 3, 1995, and January 19, 1999, the last of which amended and supplanted the earlier motions. The State of Florida's response to the last amended motion was filed on June 25, 1999. On July 6, 2000, the trial court conducted a hearing under *Huff v. State*, 622 So.2d 982 (Fla. 1993).

The trial court conducted an evidentiary hearing on ineffective assistance of counsel claims presented in Claims I and II of the amended Rule 3.850 motion. Testimony and evidence was presented on August 29, August 30, and October 24, 2000.

On June 22, 2001, the trial court entered its Order Denying Amended Motion to Vacate Judgments of Conviction and Sentences. A timely appeal was filed with the trial court on July 19, 2001, which was denied on January 9, 2003 by the Florida Supreme Court in *Lucas v. State*, 841 So. 2d 380 (Fla. 2003). The Court ruled in the following manner:(1) attorney at resentencing did not prejudice defendant by failing to present irrelevant evidence that victim had not been dragged or to present evidence to rebut the state's claim that victim suffered through a physical beating, and (2) trial attorney did not prejudice defendant by failing to determine the particular drug ingested by defendant, PCP, on the day of the crime and to present evidence of its

effect. At the same time, the Florida Supreme Court denied Lucas' *Ring* claim from his petition for writ of habeas corpus. *Id.* at 389.

A Petition for Habeas Corpus was filed on April 13, 2004. The district court denied the petition on September 5, 2008. On November 3, 2008, the district court granted petitioner a certificate of appealability on five claims. The United States Court of Appeals for the Eleventh Circuit denied relief on June 8, 2012. The United States Supreme Court issued an order denying Mr. Lucas's petition for writ of certiorari on January 7, 2013.

On January 9, 2017, Mr. Lucas filed a Successive Motion to Vacate Death Sentence. The State filed its response on January 27, 2017. A case management conference was held on February 10, 2017. On February 28, 2017, the trial court issued an Order Denying Defendant's Successive 3.851 Motion. This timely appeal follows.

Case Management Conference

On February 10, 2017, the following claims were argued before the Honorable Joseph C. Fuller for the 20th Judicial Circuit Court in Lee County, Florida, and were later denied via an order submitted on February 28, 2017:

CLAIM 1

IN LIGHT OF *HURST,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM 2

UNDER *HURST V. STATE*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM 3

IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST V. STATE*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

CLAIM 4

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND MUST ALSO BE CONSIDERED WITH PREVIOUSLY RAISED POSTCONVICTION CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. LUCAS' PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING.

CLAIM 5

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

Standard of Review

This is an appeal from a Successive Motion under Fla. R. Crim. P. 3.851. Motions filed under R. 3.851, Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal, must meet the following criteria:

> (e) Contents of Motion.
> (2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and

> sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).
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>
> (d) Time Limitation.
> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

The Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).*

Summary of Argument

I. The lower court erred in finding that the appellant is not entitled to retroactive application of *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 2o.3d 40 (Fla. 2016). The lower court erred in precluding the appellant from relief, solely because his case became "final" prior to the decision in *Ring v. Arizona*, 536 U.S. 583 (2002). Mr. Lucas raised a *Ring*-like claim at the earliest opportunity via a Motion to Dismiss Indictment filed on September 20, 1976. **(See attached exhibit).** The appellant also filed an actual *Ring* claim in his writ for habeas corpus which was denied by the Florida Supreme Court on January 9, 2003. *Lucas v. State*, 841 So.2d 380, 389 (Fla. 2003). Moreover, Mr. Lucas should receive retroactive application of *Hurst* because fundamental fairness requires it. The concept of partial retroactivity is unconstitutional. *Hurst v. State* is a case of fundamental legal significance, which requires retroactive application as applied to Mr. Lucas.

Mr. Lucas is entitled to relief under *Witt v. State*, 387 So.2d 922 (1980), as his eleven to one jury recommendation makes it beyond the power of the state to impose the sentence of death. Also, Mr. Lucas is entitled to retroactive application of Fl. Stat. Chapter 2017-1 which amended § 921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the

possibility of parole." Thus, a substantive right was created, which mandates retroactive effect.

This substantive right is similar to intellectually disabled defendants in *Walls v. State*, --So.3d--, 2016 WL 6137287 (Fla. 2016) and juveniles in *Falcon v. State*, 162 So.3d 954 (Fla. 2015). Mr. Lucas's nonunanimous advisory panel recommendation places beyond the power of the state to impose a particular sentence. Mr. Lucas's advisory panel formally voted against the death penalty, and thus his death sentence violates the Florida Constitution, Florida Chapter 2017-1 and the Eighth Amendment of the U.S. Constitution.

II. The appellant's sentence of death violates the Eighth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution. The sentence is also contrary to evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Under *Hurst v. State*, any sentence of death requires a unanimous jury recommendation.

The appellant's sentencing proceeding also violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the advisory panel's sentencing responsibility was diminished. There is no rational reason why Hurst should be retroactive only back to *Ring* (2002) but not to *Caldwell* (1985). The burden is on the state to prove by beyond a reasonable doubt that the jury's failure to unanimously find all of the facts necessary for

imposition of the death penalty did not contribute to Mr. Lucas's death sentence.

III. Mr. Lucus's death recommendation resulted in error which was not harmless beyond a reasonable doubt, in violation of the appellant's rights under both the Florida Constitution and the U.S. Constitution. The appellant's jury was actually a mere advisory panel, one that did not make any findings of fact. There is no way of knowing what, if any aggravators the advisory panel found were proven beyond a reasonable doubt. The advisory panel did not unanimously recommend death, and there is no way of knowing if the advisory panel found that the aggravating factors outweighed the mitigating factors. Mr. Lucas's mitigating factors were significant and compelling.

IV. The appellant's death sentence violates the Florida Constitution. Pursuant to Article I, Sections 15(a) and 16 (a) of this state's Constitution, Mr. Lucas's aggravating factors should have been presented as elements in a proper Grand Jury Indictment, so that he could be fully informed of the charges against him. Specifically, the "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215. 1219 (1999).

V. The appellant's postconviction claims should be reheard under a constitutional

framework. A new sentencing proceeding, under a properly instructed jury, would Include the claims raised in Mr. Lucas's prior 3.851 Motion for Postconviction Relief. The Denial of those claims under a *Strickland* analysis, does not negate the fact that the mitigation found during postconviction would be compelling enough to a properly instructed jury to vote for a life sentence.

Argument

ISSUE I

THE LOWER COURT ERRED IN DETERMING THAT MR. LUCAS IS NOT ENTITLED TO A NEW PENALTY HASE PROCEEDING, CONSIDERING MR. LUCAS HAD A NONUNANIMOUS JURY RECOMMENDATION.

Fundamental Fairness

On April 3, 1987 an advisory panel recommended a death sentence for the appellant by a vote of eleven to one. (R. 807, 888). Based on this nonunanimous recommendation, Mr. Lucas is entitled to a new penalty phase proceeding. On December 22, 2016, the Florida Supreme Court decided that, as a matter of state law, there are two classes of defendants who are entitled to the retroactive application of *Hurst v. State*: Those whose sentences became final after the Supreme Court issued its decision in *Ring*; and there was also analysis based on those defendants who specifically preserved a *Ring*-like issue. *See, Mosley v. State,* 209 So.3d 1248 (Fla. 2016 at 1276-1284 & fn.13 (citing *James v. State,* 615 So. 2d 668 (Fla. 1993).

Considerations of fundamental fairness should dictate the application of the requirements contained in *Hurst v. Florida* to this class of defendant. Mr. Lucas is within the class, because he "raised a *Ring* or *Ring*-like claim at his first opportunity and was then rejected at every turn ... fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to him. *Mosley* at 1274.

Furthermore, like Mosley, Mr. Lucas, challenged the constitutionality of Florida's death penalty sentencing scheme at the earliest opportunity. *See, Mosely* at fn. 11; and contrast with *Asay v. State*, 210 So.3d 1 (Fla. 2016) at fn. 12. The appellant, however, challenged the constitutionality of the Florida death penalty scheme as early as September 20, 1976, during his initial trial proceeding as part of a Motion to Dismiss Indictment. **(See attached exhibit).** Mr. Lucas should get the benefit of Hurst relief, because his counsel attacked the scheme based on a similar basis, almost three decades before *Ring* even existed. There is nothing more trial counsel could have done.

This Court held that it has the power to reconsider and correct erroneous rulings in exceptional circumstances, where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Owen v. State*, 696 So. 2d 715, 720 (Fla. 1997). (See also, Justice Pariente concurring in *Walls*). Similar to the issues of fundamental fairness articulated in *James*, it would

be a "manifest injustice" to deprive Mr. Lucas relief simply due because something as arbitrary as when his case became final.

Additionally, once this Court determined in *Mosley* that the *Hurst* decisions were retroactive to some cases on collateral review, it became prohibited under the United States and Florida Constitutions from arbitrarily limiting that retroactivity. The concept of partial retroactivity has no basis in the Florida Supreme Court's or the United States Supreme Court's precedent, and will lead to bizarre and unfair results, and would violate the Eighth and Fourteenth Amendments. *See Asay*, at *74 (Perry, J., dissenting) ("Undoubtedly, there will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification from this Court."). As this Court has explained in the retroactivity context, "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon v. State*, at 962 (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925. *See also*, Justice Anstead's prescient dissent in *Johnson v. State*, 904 So.2d 400, 417-429 (Fla. 2005), and at FN 14, the long list of decisions that have been applied retroactively.

The Witt Analysis

Also, as Mr. Lucas is a member of a protected class, the case law mandates retroactive *Hurst* relief. The first two *Witt* factors are obvious, in that *Hurst* analysis originates from the United States Supreme Court, the Florida Supreme Court, and it's constitutional nature. *Witt* at 930. The appellant's right to retroactivity under *Hurst* can be arrived at by analyzing the third *Witt* factor, a change of fundamental significance, using the first category of cases - where the constitutional change in the law "places beyond the authority of the State the power to ...impose certain penalties." *Id.* at 929-30. As in *Walls* and *Falcon,* under *Hurst* and *Hurst v. State* it increases the number of potential cases in which the State cannot impose the death penalty.

Before *Hurst*, a death sentence could be lawfully sustained where there was a mere majority of the jurors advising the judge to impose a death sentence. Additionally, a judge could sentence anyone to death, even if the jury recommended life. *Hurst* overruled *Spaziano*[1] and it is no longer constitutional for a trial court to override a jury's life recommendation. Now, only where a jury has unanimously found that sufficient aggravators exist to justify a death sentence, and that the aggravators outweigh the mitigating factors that were present in the case, and have

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1 *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

unanimously recommended death can a defendant be sentenced to death. Due to the less than unanimous advisory recommendation, the appellant's status makes it beyond the power of the state to impose the sentence of death. Based on the Court's analysis of the third *Witt* factor, *Falcon* mandates that it is beyond the power of the state to automatically sentence juveniles to life in prison without the possibility of parole, and the right shall have retroactive effect. Similarly, in *Walls*, retroactive effect is given to litigants subjected to the prior unconstitutional standard which precluded individuals with an IQ higher than 75, from proving intellectual disability. It follows, based on this Court's *Witt* analysis, individuals who are condemned on death row because of less than unanimous advisory panel recommendations, should receive application of *Hurst*, as it is beyond the power of the state to impose a sentence of death on such individuals.

Retroactivity & Federal Legal Principals

Specifically, this Court held that the Eighth Amendment was applicable to the need for unanimous jury fact-finding as to (1) each aggravating circumstance; (2) those particular aggravators' cumulative sufficiency to justify the death penalty; and (3) those particular aggravators' cumulative outweighing of the mitigation. This Court further found that the unanimity is (1) required to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst

offenders, and (2) ensures that the sentencing 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 making the point to ensure that Florida's unanimity rule complies with the Eighth Amendment, *Hurst* strives to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." This accomplishment by Florida makes *Hurst* substantive, based on federal retroactivity law. *See Welch v. United States*, 136 S.Ct. 1257, 1265 (2016) stating ("This Court has determined whether a new rule is substantive or procedural by considering the function of the rule.")

Welch is on point with the case at bar, as *Welch* dealt with the retroactive effect of a substantive constitutional rule found in *Johnson v. U.S.*, 135 S.Ct. 2551, 2560 (2015). In Johnson, the Court held that a federal statute that 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. The Court in *Welch* held that the *Johnson* ruling was substantive because "it affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied," and thus the law is to be applied

retroactively. *Welch*, 136 S.Ct. at 1265. The Court in *Welch* went on to clarify that whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather 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 the law punishes." *Id.* at 1266. The Court in *Welch* pointed out, "after *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence." *Id.* Thus, the *Welch* Court went on to hold, "*Johnson* establishes, in other words, that even the use of impeccable fact-finding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that Johnson is a substantive decision." *Id.* (internal quotation omitted).

This *Welch* analysis clearly applies to the Hurst decisions. The holdings in *Hurst v. Florida* and *Hurst v. State* that the Sixth Amendment requires each element of a Florida death sentence to be found *beyond a reasonable doubt*, and this Court's holding in *Hurst v. State* that jury unanimity is required to ensure that Florida's overall capital sentencing scheme 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 murders," *Hurst v. State* at 50, are substantive constitutional rulings within the meaning of federal law that place certain murders "beyond the State's power to punish," *Welch*,136 S.Ct at 1265, with a sentence of death. The decision in *Welch* makes it clear that a substantive rule, rather than a procedural rule, "alters...the class of persons that the law punishes." *Id.*

Under federal law, the fact that the *Hurst* decisions must be applied retroactively is not contradicted by *Schiro v. Summerlin*, 542 U.S. 348, 364 (2004). *Summerlin* held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* is not applicable to *Hurst*. First of all, in *Hurst*, unlike in *Summerlin*, there is an Eighth Amendment unanimity requirement, in addition to the Sixth Amendment jury trial issue. Also, *Hurst*, unlike *Ring*, addressed the *proof beyond a reasonable doubt* standard in addition to the right to a jury trial. The United States Supreme court has always regarded such decisions to be substantive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016)(holding *Hurst* retroactive under Delaware's state Teague-based retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not...the applicable *burden of proof*.") (emphasis added) Federal law clearly supports

retroactive relief. If this Court denies *Hurst* relief to Mr. Lucas on retroactivity grounds, without taking into account the controlling federal rule of law, it would be unconstitutional.

"[R]etroactivity is binary—either something is retroactive, has effect on the past, or it is not." *See*, *Asay*, at *71 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery v. Louisiana*,[2] the Delaware Supreme Court's recent decision in *State v. Powell* --A. 3d --, 2016 WL 3023740 (Del. 2016) and the Florida Supreme Court's decision in *Falcon*. If the Court decides to endorse "partial retroactivity," it will be the outlier, *see State v. Powell*, *Id.* (holding *Hurst v. Florida* retroactive to *all* prisoners), and constitutional challenges in the United States Supreme Court will likely follow.

Finally, 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, Montgomery*, ("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 *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. *First*, the Florida Supreme Court held that the

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2 *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016).

Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. Such findings are manifestly substantive. *Second*, the Florida Supreme Court determined that the Eighth Amendment requires a unanimous determination that all the evidence presented to a jury at the penalty phase warrants a death sentence. Likewise, the unanimity rule is substantive. Therefore, the *Hurst* rulings should apply to this case.

Beyond a Reasonable Doubt Standard

The appellant is also entitled to retroactive relief, based on another principal in federal capital jurisprudence. The *Hurst* cases announced more new substantive rules. The Court in *Hurst v. State*, in interpreting *Hurst v. Florida*, held that the jury must find certain facts *beyond a reasonable doubt*: (1) each aggravating circumstance: (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So.3d at 53-59. The United States Supreme Court has consistently held that *proof beyond a reasonable doubt* rules are not procedural, but rather are substantive. *Ivan V. at* 205.

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

In Ivan V., the Supreme Court applied Winship's proof-beyond-a-reasonable doubt standard retroactively, stating,

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). See Adams v. Illinois, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); Roberts v. Russell, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968).

> Winship expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S.Ct., at 1072.
>
> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and Winship is thus to be given complete retroactive effect.
>
> Ivan V. v. City of N.Y., 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952, (1972).

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), the Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. *Id. at 704, 1892.* Thus, under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion. This right was so fundamental that the United

States Supreme Court found no issue with retroactive application in *Hankerson v. N. Carolina*, 432 U.S. 233, 240–41, 97 S. Ct. 2339, 2344, (1977).

Hurst v. Florida mandates that the State prove each element beyond a reasonable doubt. Mr. Lucas was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. The law dictates that this substantive right be applied retroactively.

Chapter 2017-1

A last point regarding *Hurst* and retroactivity is based on Florida's new capital sentencing statute. On March 13, 2017, the Governor signed Chapter 2017-1 into law. The preamble explained itself as "[a]n act relating to sentencing for capital felonies; amending ss. 921.141 and 921.142, F.S.; requiring jury unanimity rather than a certain number of jurors for a sentencing recommendation of death." Chapter 2017-1 amended § 921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." Section 921.141(3)(a) provides that "[i]f the jury has recommended a sentence of ...[l]ife without the possibility of parole, the court shall impose the recommended sentence." As a result, Florida's capital sentencing statute now precludes the imposition of a death sentence unless a jury returns a unanimous death

recommendation.

In an opinion issued on April 13, 2017, the Florida Supreme Court addressed the enactment of Chapter 2017-1 and stated:

> the Florida Legislature enacted chapter 2017-1, Laws of Florida, effective March 13, 2017. This legislation requires a jury to unanimously determine that a defendant should be sentenced to death before a trial court may impose the death penalty.

In re: Standard Criminal Jury Instructions in Capital Cases, _ So. 3d _, Case No. SC17-583, Slip Op. at 2 (Fla. April 13, 2017). The Court acknowledged that Chapter 2017-1 was enacted in response to its holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

> we held that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. We further held that a unanimous jury recommendation for death is required before a trial court may impose a sentence of death. *Id.*

In re: Standard Criminal Jury Instructions in Capital Cases, Case No. SC17-583, Slip Op. at 2. While the State has filed a petition for a writ of certiorari in the U.S. Supreme Court seeking review of the decision in *Hurst v. State*, the enactment of Chapter 2017-1 recognizing the right to a life sentence unless a jury unanimously

recommends the imposition of a death sentence now exists separate and apart from *Hurst v. State*. The vested statutory right will not be affected by any action taken by the U.S. Supreme Court in *Florida v. Hurst*, US Supreme Court Case No. 16- 998.

Before the enactment of Chapter 2017-1, the Florida's capital sentencing statute was substantially revised when Chapter 2016-13 was enacted on March 7, 2016. This occurred after the January 12, 2016, issuance of *Hurst v. Florida*, 136 S. Ct. 616 (2016), which declared Florida's capital sentencing scheme unconstitutional. The Florida Legislature passed Chapter 2016-13 to correct the constitutional defect identified by the U.S. Supreme Court in *Hurst v. Florida*. On March 7, 2016, the Governor signed Chapter 2016-13 into law. It provided that unless ten jurors voted to recommend a death sentence, a capital defendant could not be given a death sentence. Thus, the legislature increased the number of jurors required to vote in favor of a death sentence before the jury's recommendation qualified as a death recommendation, and it eliminated a judge's ability to override a life recommendation.

On October 14, 2016, on the basis of its decision in *Hurst v. State*, the Florida Supreme Court found the 10-2 provision unconstitutional in *Perry v. State*, 210 So. 3d 630,(Fla. 2016). Otherwise, the Florida Supreme Court in *Perry* concluded that Chapter 2016-13 was intended to be applied retrospectively to pending homicide

prosecutions in which the crime occurred prior to the enactment of Chapter 2016-13. *Id.* at 635 ("we conclude that ... most of the provisions of the Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions"). However, the Florida Supreme Court concluded that the unconstitutional provision was not severable and left it to the legislature to rewrite the statute in a constitutional fashion. Months later, the Florida Supreme Court changed its position and indicated that the unconstitutional provision in Chapter 2016-13 was severable. *Evans v. State*, _ So. 3d _, 2017 WL 664191 *3 (Fla. Feb. 20, 2017) ("Accordingly, pursuant to our holding in *Perry*, the revised statutory scheme in chapter 2016–13, Laws of Florida, can be applied to pending prosecutions because "most of the provisions of the Act can be construed constitutionally and [can] otherwise be validly applied to pending prosecutions." *Id.* at 635. ").[3]

While the holding in *Hurst v. State* was premised upon the Florida Constitution, Chapter 2016-13 and Chapter 2017-1 were both crafted by the Florida Legislature and signed into law by the Governor. The Florida Supreme Court has said: "Generally, the Legislature has the power to enact substantive law, while the Court

3 Nevertheless, Chapter 2017-1 was enacted within weeks of the decision in *Evans v. State* and revised the statute in the manner *Perry* had indicated was necessary.

has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). It also has written: "Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). The Florida Supreme Court has explained:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).

Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). In *Benyard Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), the Florida Supreme Court reiterated:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.

Pursuant to separation of powers, matters of procedure are a judicial function and not a legislative function. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) ("where there is no substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional."); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.").

Chapter 2016-13 initially established a retrospective substantive right that a capital defendant could not receive a death sentence if three or more jurors voted to recommend a life sentence. Subsequently, based on chapter 2017-1, a right under the Florida Constitution was recognized in *Hurst v. State* requiring a unanimous death recommendation in addition to a first degree murder conviction before a judge was authorized to impose a death sentence. On the basis of this constitutional right, Chapter 2016-13 was declared unconstitutional. Chapter 2017-1 included the right to a life sentence unless a jury returned a unanimous death recommendation, which it extended retrospectively to all capital defendants in pending capital prosecutions regardless of the date of the alleged capital crime.

This Court ruled in *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992), that

"[a]ny rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, §§ 9, 16, Fla. Const." Accordingly, this Court held: "any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final." *Id.* The Court explained the basis for this rule:

> "selective application of new rules violates the principle of treating similarly situated defendants the same," because selective application causes "'actual inequity'" when the Court "'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." [*Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)] (*quoting [United States v.]Johnson*, 475 U.S. at 556 n. 16, 102 S.Ct. at 2590 n. 16).

Id. Thus, in *Smith v. State*, the Florida Supreme Court found a right under the Florida Constitution to the fair and evenhanded application rules of law that requires similarly situated defendants to be treated the same.

Recently, in accord with *Smith v. State* and the constitutional right discussed therein, this Court applied *Hurst v. State* which it issued on October 14, 2016, as governing law in all nonfinal cases pending on direct appeal. *Deviney v. State*, _ So. 3d _, 2017 WL 1090560 *5 (Fla. March 23, 2017) ("New rules of law set down by this Court . . . apply to cases on direct review or those

not otherwise finalized. [Citation omitted] This case is before us on direct appeal; therefore, Deviney's appeal is subject to *Hurst v. State*.").

With the enactment first of Chapter 2016-13 and then of Chapter 2017-1, the legislature created a substantive right to a life sentence unless a jury returns a death recommendation that includes the finding of statutorily required facts. Under Chapter 2016-13, it took ten jurors voting for a death sentence to return a death recommendation and authorize a death sentence. This meant when three or more jurors voted for a life sentence, a death sentence was not authorized. Then, in Chapter 2017-1, the substantive right established in Chapter 2016-13 was broadened and the right to a life sentence could only be overcome if the jury unanimously recommended a death sentence. One juror voting for a life sentence now precludes the imposition of a death sentence. Because Chapter 2016-13 was found to apply retrospectively, the statutorily created substantive right was extended to all homicide defendants regardless of the date that the homicide was committed. Chapter 2017-1 did not change the extension of the right retrospectively, but merely broadened the right by requiring a unanimous death recommendation before a death sentence was authorized.

A capital defendant's right to a life sentence unless a jury returns a death recommendation is a substantive right. Whether viewed as a legislatively created right that applies retrospectively or a constitutional right identified in *Hurst v.*

State, it is a substantive right, not a procedural rule. The right to a life sentence unless a jury unanimously returns a death recommendation as noted in *Hurst v. State* did not arise from the Sixth Amendment principles of *Apprendi v. New Jersey*, *Ring v. Arizona*, or *Hurst v. Florida*. It is derived either from legislative enactments or the Florida Constitution or both. A state created right that carries a liberty or life interest with it is protected by the Due Process Clause of the Fourteenth Amendment.

The U.S. Supreme Court has recognized that States "may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445, 480, 488 (1980). "Once a State has granted prisoners a liberty interest, [the U.S. Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Id.* at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power."). In *Evitts v. Lucey*, 469 U.S. 387, 400 (1985), the U.S. Supreme Court recognized that "a State need not provide a system of appellate review as of right at all." States have the option to not provide appellate review of criminal convictions. *See McKane v. Durston*, 153 U.S. 684 (1894). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless

act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. at 401. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1955), and *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent."). Who gets the benefit of the substantive right and who does not must not offend the Due Process Clause.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the United States Supreme Court recognized that the due process principles of fairness and the administration of justice with an even hand required treating similarly situated defendants the same:

> James Kirkland Batson, the petitioner in *Batson v. Kentucky,* and Randall Lamont Griffith, the petitioner in the present Kentucky case, were tried in Jefferson Circuit Court approximately three months apart. The same prosecutor exercised peremptory challenges at the trials. It was solely the fortuities of the judicial process that
>
> determined the case this Court chose initially to hear on plenary review. Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine."

> *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306
> (1977) (opinion concurring in judgment), *quoting Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting).
> *See also Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). **The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556,
> n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

Griffith v. Kentucky, 479 U.S. 327-28 (emphasis added).[4] "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323.

Besides Due Process, the Eighth Amendment is implicated in how substantive rights are doled out arbitrarily in capital cases. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the U.S. Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from

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4 Justice Harlan in his dissent in *Desist v. United States* wrote:
We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.
394 U.S. at 258-59.

arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment' " in any capital case. See *Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens,* 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85.

On June 12, 2001, legislation was enacted in Florida to preclude the imposition of a death sentence on intellectually disabled defendants:

> A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

Section 921.137(2), Fla. Stat. The statute included language indicating that the substantive right did not apply retrospectively and did not apply to any death sentence that had been imposed before the effective date of the legislation. *See*

§921.137(8) ("This section does not apply to a defendant who was sentenced to death prior to the effective date of this act."). However, when the Florida Supreme Court promulgated a rule regarding the procedure used in determining an individual's intellectual disability, it included procedures for those already under a sentence of death to challenge their death sentences on the basis of their intellectual disability. *In re Amendments to Fla. R. Crim. P. and Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). While *Atkins v. Virginia*, 536 U.S. 304 (2002), had issued by the time the Florida Supreme Court adopted Rule 3.203, it had not issued when the rules committee first proposed Rule 3.203. *Id.*, 875 So. 2d at 565. In any event, the substantive right statutorily created in 2001 has been applied to defendants who had been sentenced to death prior to the effective date of § 921.137, which was June 12, 2001. The statutorily created right has been extended to those who were under a sentence of death when § 921.137 became effective. For example, Freddie Hall's sentence of death was affirmed eight years earlier. *See Hall v. State*, 614 So. 2d 473 (Fla. 1993), *cert denied*, 510 U.S. 834 (1993). Yet on the basis of his intellectual disability, his death sentence was vacated and a life sentence imposed. *Hall v. State*, 201 So. 3d 628 (Fla. 2016). *See Herring v. State*, 2017 WL 1192999 (Fla. March 31, 2017) (vacating a death sentence affirmed in a 1984 direct appeal on the basis of intellectual disability and ordering a life sentence imposed). The Eighth Amendment did not permit § 921.137 to be applied only to those who had

not yet been sentenced to death when the statute was enacted.

Further, the Eighth Amendment was implicated in Florida's line drawing as to who was intellectually disabled and who was not. In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the U.S. Supreme Court found that Florida's procedure for determining intellectual disability was inadequate to reliably insure that an intellectually disabled defendant was not executed. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001. Because Florida ignored that inherent imprecision, the Supreme Court found that "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* The Supreme Court explained: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

Prior to Chapter 2017-1, prior to *Hurst v. State*, and prior to Chapter 2016-13, Florida law provided for a penalty phase jury to hear evidence and return an advisory recommendation as to the sentence by a majority vote. Seven jurors were required to vote in favor of a death recommendation for the advisory verdict to in fact be a death recommendation. Because the sentencing judge was required to give

great weight to the advisory recommendation, the jury was essentially a co-sentencer. *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) ("the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances"); *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) ("In *Espinosa*, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge."). The change first made in Chapter 2016-13 was to require ten jurors voting in favor of a death sentence necessary for a death recommendation to be returned, and to require the imposition of a life sentence when a life recommendation (three or more jurors voting in favor of a life recommendation) was returned by the jury. Then, based on Chapter 2017-1, a unanimous death recommendation was determined to be required before a judge becomes authorized to impose a death sentence.

There can be no question that with one juror in Mr. Lucas's case voting in favor of a life sentence, there is a very large risk that the death penalty was improperly imposed because he was not unanimously convicted of capital first degree murder, i.e. first degree murder plus those statutorily defined facts necessary to authorize a judge to impose a death sentence. Indeed, under Chapter 2017-1, the eleven to one death recommendation would constitute an acquittal of capital first degree murder and preclude the imposition of a death sentence.

This matter is not just about retroactivity of a court ruling. It is about a statutorily created substantive right that was intended to be retrospective. The statutorily created substantive right is being extended to defendants whose cases became final prior to *Ring*. There is no valid basis under Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment for depriving Mr. Lucas of that statutorily created substantive right. "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power.").

Failing to grant Mr. Lucas the benefit of the substantive right contained in Chapter 2017-1 violates Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment. Mr. Lucas is entitled to the same substantive right extended to pre-*Ring* defendants. As it is, Mr. Lucas's death sentence stands in violation of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Lucas's death sentences must be vacated and a resentencing ordered.

The Appellant's Plight

Mr. Lucas has been before this court at least a half a dozen times since his initial conviction, followed by sentence of death on August 14, 1976. This Court remanded the case for a new sentencing phase in *Lucas I* due to improper consideration of a non-statutory aggravator. This Court again remanded the case in *Lucas II* because the trial court did not properly reweigh the aggravating and mitigating circumstances. In *Lucas III*, this Court again remanded the case to the circuit court, because the defendant should have been permitted to present additional testimony and argument, Mr. Lucas was improperly precluded from presenting mitigating factors beyond the statute, and the aggravating factor "creating great risk of death to many people" aggravating factor was not applicable to the facts of appellant's case. Lastly, in *Lucas IV,* this court again remanded the case to the circuit court, because the trial court was tasked with rewriting and reconsidering the findings of fact.

Not only were Mr. Lucas's prior penalty phase proceedings under an unconstitutional system, he is a poster boy for the failings of the *judge as fact-finder* centered scheme. Every single prior remand was because of errors resulting from denying Mr. Lucas an actual jury of fact-finders, which violated Mr. Lucas's Sixth Amendment rights. As previously argued, Mr. Lucas's Eighth Amendment rights have also been violated. Mr. Lucas's current predicament runs contrary to controlling case law at both the state and federal level. It would be a miscarriage

of justice to deny Mr. Lucas retrospective application of *Hurst v. Florida*, *Hurst v. State*, *Perry v. State*, and Chapter 2017-1. Relief is proper.

ISSUE II

THIS COURT SHOULD VACATE MR. LUCAS'S DEATH SENTENCE AND IMPOSE A SENTENCE OF LIFE. IN LIGHT OF HURST AND SUBSEQUENT CASES, MR. LUCAS'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE HIS DEATH SENTENCE WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO EVOLVING STANDARDS OF DECENCY

From now on, individuals facing a death sentence will have the protection of a jury. Individuals, for no other reason than that their case became final after Ring was issued, will receive new trials that follow the constitutional requirements of *Hurst* and *Hurst v. State*. They will receive an actual sworn jury fully instructed on the jury's role as the ultimate decision maker. The State will have the burden of proving every aggravating factor beyond a reasonable doubt, the jury must unanimously decide that the aggravators outweigh the mitigators, and then the jury must unanimously recommend death.

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

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [ ] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and

> deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

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

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

The Supreme Court has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, "one of the most important functions any jury can perform in making

. . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, 2929, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved. *Id.* citing *Furman v. Georgia*, 408 U.S., at 439-440, 92 S.Ct., at 2828-2829 (Powell, J., dissenting). Mr. Lucas had no jury and thus his death sentence had none of the Eighth Amendment's reliability of a jury verdict.

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

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

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

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* at 189, 2932. In *Gregg*, the Court upheld Georgia's death penalty scheme and found,

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

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

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

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate

> awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341, 2646. Any reliance or argument based on the advisory recommendation in Mr. Lucas's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell.* An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme, does not meet the Eighth Amendment requirements of *Caldwell. In re: Standard Criminal Jury Instructions in Capital Cases*, _ So. 3d _, Case No. SC17-583, Slip Op. at 2 (Fla. April 13, 2017) attached the changes to the jury verdict form as an appendix to the opinion. The *Caldwell* error of the prior unconstitutional scheme is illuminated by the changes made in Chapter 2017-1, where multiple references to words like advisory and recommend/recommendation have been eliminated. Mr. Lucas's constitutional rights were violated in his case, as the role of the jury was improperly diminished. Mr. Lucas is entitled to a properly instructed actual jury.

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

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

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

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

On remand in *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. This Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact- finding.

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

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The Court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence*

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

This Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted)." *Hurst v. State,* at 60.

Mr. Lucas was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell.* A mere recommendation of eleven to one would be inadequate under *Hurst v. State, Perry v. State, and* Chapter 2017-

1. To subject Mr. Lucas to the death penalty based on Florida's previous unconstitutional system when a non-unanimous jury advisory recommendation would today violate the United States and the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. Lucas is ensconced in a class of individuals who may not be subject to the death penalty. Mr. Lucas was sentenced to death without the reliability of jury fact-finding and unanimity. His death sentence violates the Eighth and Fourteenth Amendments. This Court should vacate his death sentence and impose a sentence of life without the possibility of parole. At the very least, Mr. Lucas should be granted a new penalty phase proceeding conducted under a constitutional framework.

ISSUE III

MR. LUCUS'S DEATH RECOMMENDATION RESULTED IN ERROR WHICH WAS NOT HARMLESS BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

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

Mr. Lucas's advisory panel recommended death by an eleven to one margin. While this does not suffice to meet *Hurst v. Florida*'s jury requirement or *Hurst v. State*'s unanimity requirement, see *Caldwell,* it does also counter any attempt by the State to show that the Sixth Amendment violations in this case are harmless - - beyond a reasonable doubt. Removed from the constitutional responsibility that subjected a fellow citizen to death, the advisory panel still returned a recommendation that would have required a life sentence if the advisory panel were a jury acting under a constitutional system.

Moreover, Mr. Lucas's case, as seen at trial and in postconviction was highly mitigated. At the time of offense, Mr. Lucas was a mere twenty four years old. The

trial and postconviction evidence showed that the appellant had no significant criminal history, he acted under extreme mental or emotional disturbance and extreme duress, his ability to conform his conduct to the requirements of the law was substantially impaired, the murder was committed due to uncontrolled passions, Mr. Lucas was a worker, and he suffered from a long period of drug and alcohol addiction. Upon review of the mitigation, Mr. Lucas's case is clearly one of the most mitigated, even with the aggravation present in his case.

Any attempt by the State to argue that the constitutional violations argued in this motion were harmless beyond a reasonable doubt fails. This Court has repeatedly found that Hurst error was not harmless when the advisory panel's recommendation was less than unanimous.

Apart from the issue of retroactivity, this Court has repeatedly held that non-unanimous death recommendations render the Sixth Amendment error of Hurst not harmless: The Court has now addressed harmless error and granted relief in numerous non-unanimous-recommendation cases that are materially indistinguishable from the appellant's. *See, e.g.*, *Johnson v. State,* 205 So. 3d 1285, 1288 (Fla. 2016) (11-1 jury vote); *McGirth v. State,* 209 So. 3d 1146, 1150 (Fla. 2017) (11-1 jury vote); *Durousseau v. State,* No. SC15-1276, 2017 WL 411331, at *5-6 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 569 (Fla. 2017) (10-2 jury vote); *Hodges v. State,* No. SC14-878, 2017 WL 1024527 at *2

(Fla. Mar. 16, 2017) (10-2 jury vote); *Smith v. State,* Nos. SC12-2466 & SC13-2111, 2017 WL 1023710 at *17 (Fla. Mar. 17, 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1245 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, No. SC13-5, 2017 WL 410215, at *2 (Fla. Jan. 31, 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4 jury vote); *Mosley*, 209 So. 3d at 1284 (8-4 jury vote); *Dubose,* 2017 WL 526506, at *11 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, 2017 WL 930924, at *12 (Fla. Dec. 1, 2016) (8-4 jury vote); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (Fla. Mar. 9, 2017) (9-3 and 11-1 jury votes); *Ault* v. *State*, No. SC14-1441, 2017 WL 930926 at *8 (Fla. Mar. 9, 2017) (9-3 and 10-2 jury votes); *Jackson v. State,* SC13-1232, 2017 WL 1090546 at *6 (Fla. Mar. 23, 2017) (11-1 jury vote); *Baker v. State*, Nos. SC13-2331, SC14-873, 2017 WL 1090559 at *2 (Fla. Mar. 23, 2017) (9-3 jury vote); *Deviney v. State*, No. SC15-1903, 2017 WL 1090560 at *1 (Fla. Mar. 23, 2017) (8-4 jury vote); *Orme v. State*, Nos. SC13-819 & SC14-22, 2017 WL 1177611, at *1 (Fla. Mar. 30, 2017) (11-1 jury vote); *Bradley v. State*, No. SC14-1412, 2017 WL 1177618, at *2 (Fla. Mar. 30, 2017) (10-2 jury vote); *White v. State*, No. SC15-625, 2017 WL 1177640, at *1 (Fla. Mar. 30, 2017) (11-1 jury vote); *Guzman v. State*, No. SC13-1002, 2017 WL

1282099, at *1 (Fla. Apr. 6, 2017) (7-5 jury vote); *Abdool v. State*, Nos. SC14-582 & SC14-2039, 2017 WL 1282105, at *8 (Fla. Apr. 6, 2017) (10-2 jury vote); *Newberry v. State*, No. SC14-703, 2017 WL 1282108, at *4-5 (Fla. Apr. 6, 2017) (8-4 jury vote); *Heyne v. State*, No. SC14-1800, 2017 WL 1282104, at *5 (Fla. Apr. 6, 2017) (10-2 jury vote); *Robards v. State*, No. SC15-1364, 2017 WL 1282109, at *5 (Fla. Apr. 6, 2017) (7-5 jury vote); *McMillian v. State*, No. SC14-1796, 2017 WL 1366120, at *11 (Fla. Apr. 13, 2017) (10-2 jury vote); *Brookins v. State*, No. SC14-418, 2017 WL 1409664, at *7 (Fla. Apr. 20, 2017) (10-2 jury vote); *Banks v. Jones*, No. SC15-297, 2017 WL 1409666, at *9 (Fla. Apr. 20, 2017) (10-2 jury vote); Altersberger v. State, --- So.3d --- WL 2017 1506855 (Fla. April 27, 2017) (9-3 vote); Hampton v. State, --- So.3d --- WL 2017 1739237 (9-3 vote); *Card v. State, --- So.3d --- WL 2017 1743835 (Fla. May 4, 2017)* (11-1 vote); *Pasha v. State*, No. SC13-1551 (Fla. May 11, 2017) (11-1 vote); *Serrano v. State*, No. SC15-258 & SC15-2005 (Fla. May 11, 2017) (9-3 vote); *Snelgrove v. State*, No. SC15-1659 & SC16-124 (Fla. May 11, 2017) (2 8-4 votes); (Barry) *Davis v. State*, No. SC15-1794 (Fla. May 11, 2017) (8-4 vote and 10-2 vote); *Caylor v. State*, SC15-1823 & No. SC16-399 (Fla. May 18, 2017) (8-4 vote); *Hertz v. Julie Jones L. Jones*, No. SC17-456 (Fla. May 18, 2017) (10-2 vote). This list is obviously not exclusive, and this Court's review should include relief given to all defendants with less than unanimous recommendations.

Harmless error is not an issue in Mr. Lucas's case. The fact that a clearly harmful error has not been remedied despite the harm that Mr. Lucas suffered because of an arbitrary split in retroactive application, is the issue and mandates relief in the form of a new penalty phase proceeding. Relief is proper.

ISSUE IV

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

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

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

Hurst v. State, 202 So.3d at 44. In *Perry v. State*, --So.3d - - 2016 WL 6036982 (Fla.

2016). This Court found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional and found:

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.4 Hurst, SC12–1947, 202 So.3d at 634. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at 639–40, 639.
>
> While most of the provisions of the Act can be construed constitutionally in accordance with *Hurst*, the Act's requirement that only ten jurors, rather than all twelve, must recommend a death sentence is contrary to our holding in Hurst. *See id.* at 639, at 35 ("[W]e conclude under the commandments of Hurst v. Florida, [—— U.S. – ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)], Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.").5 Therefore, we answer the second certified question in the negative, holding that the Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death.

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

Thus, the new statute was unconstitutional. This Court would later find the unconstitutional parts of the new statute severable *See Perry v. State*, No. SC16-547, 2017 WL 664194, at *1 (Fla. Feb. 20, 2017);citing *Evans v. State*, No. SC16–1946, *Rosario v. State*, No. SC16–2133. The increase in penalty imposed on Mr. Lucas was without any jury at all and unconstitutional. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." *Id.* Lastly, there was no "unanimity in the final jury recommendation for death." *Id.* Mr. Lucas received even less constitutional procedure than that which this Court found unconstitutional in the new statute, which was revised and replaced with Chapter 2017-1.

Moreover, Mr. Lucas has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Lucas's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

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

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

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

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Lucas under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Lucas. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Lucas was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Lucas was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment.

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

ISSUE V

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND MUST ALSO BE CONSIDERED WITH PREVIOUSLY RAISED POSTCONVICTION CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. LUCAS'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING.

In *Hurst v. State*, the Florida Supreme Court explained:

> Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long- term viability of the death penalty in Florida.

Hurst v. State at 62.

In *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla.2014), the Florida Supreme Court explained then when presented with qualifying newly discovered evidence:

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

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available.

Obviously, the law that would govern at a new trial or resentencing must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a death sentence and unanimously determine that the aggravators outweigh the mitigating factors. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

This is new Florida law that did not exist when Mr. Lucas previously presented his 3.851 postconviction claims. Accordingly, before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, and before Chapter 2017-1, Mr. Lucas could not present his claim as set forth herein because the new law that would govern any resentencing ordered in Mr. Lucas's case was previously unavailable.

Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in cases in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2017-1, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's postconviction claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option.

In *Hurst v. State*, the first advisory panel that heard his case did so without the benefit of mental health mitigation and recommended death eleven to one. When the second advisory panel heard this mitigation, only seven to five recommended death for the stabbing of the clerk. During Mr. Lucas's postconviction pleadings and proceedings, additional substantial mitigation and other evidence was presented, particularly related to the extent of Mr. Lucas's drug

abuse. These matters must now be considered with the fact that Mr. Lucas did not receive a unanimous jury recommendation. This Court must re-visit and re-evaluate the rejection of Mr. Lucas's previously presented postconviction claims in light of the new Florida law which would govern at a resentencing. When a re-evaluation is conducted, the State cannot meet its burden that there is no reasonable possibility that the *Hurst* error contributed to Mr. Lucas' sentence. Accordingly, he is entitled to relief on his 3.851 postconviction claims on the basis of new Florida law set forth in *Perry v. State* and *Hurst v. State*. Mr. Lucas's death sentences should be vacated and a new penalty phase ordered.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Lucas never received a constitutional sentencing proceeding. Confidence in the outcome is undermined and the sentence of death is unreliable. Mr. Lucas requests this Honorable Court to vacate the judgments and sentences, including the sentence of death, and order a penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May 2017, I electronically filed the foregoing Initial Brief with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following, Christina Z. Pacheco, Assistant Attorney General , Christina.pacheco@myfloridalegal.com CapApp@myfloridalegal.com I further certify that a copy has been furnished by U.S. Mail to, Harold Lucas: DOC# 058279, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

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

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