IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-703

ETHERIA VERDELL JACKSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

RESPONSE TO ORDER TO SHOW CAUSE

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INTRODUCTION

Mr. Jackson's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The issue in this case is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Jackson *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Jackson. Denying Jackson *Hurst* relief because his sentence became final in 1989, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Jackson is entitled to *Hurst* retroactivity as a matter of federal law. The circuit court's order should not be affirmed in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

REQUEST FOR ORAL ARGUMENT

This appeal presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than cabining *Hurst* relief to only post-*Ring* death sentences. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Appellant also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Jackson the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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RELEVANT FACTS

Mr. Jackson was tried by a jury and found guilty on June 20, 1986 of first degree murder in the Fourth Judicial Circuit in and for Duval County. Unlike Hitchcock, Jackson, in a pre-trial motion, challenged the constitutionality of Florida's death sentencing statute "because the jury recommendation need not be unanimous thereby depriving the defendant of the right to due process and to a unanimous verdict." TR 1:63. Jackson further argued that for the jury to recommend death, the jury should be instructed that it must be "convinced beyond every reasonable doubt that the aggravating circumstances outweigh any mitigating circumstances." *Id*. at 64. Finally, Jackson argued in that same motion that the statute was unconstitutional because "it permits the trial judge when imposing the sentence to consider and find aggravating circumstances that the jury did not." *Id*. at 65. The pretrial motion was denied. Jackson was convicted of one count of first degree murder, and the jury recommended a sentence of death on July 8, 1986, by a vote of seven to five, a bare majority. The trial court sentenced Jackson to death on August 8, 1986, finding five aggravating factors and no mitigating factors. This Court affirmed the conviction and sentence on direct appeal, even though this Court found that one of the aggravating factors (cold, calculated and premeditated), had been improperly considered by the trial court. *Jackson v. State*, 530 So.2d 269 (Fla. 1988). Certiorari to the United States Supreme Court was denied on January 23, 1989. *Jackson v.*

Florida, 109 S. Ct. 882 (1989).

During the pendency of Jackson's federal habeas, *Apprendi v. New Jersey*[1] was decided and raised immediately in a supplemental brief[2]. See *Jackson v. Moore*, 3:94-CV-492-J-20. Jackson also filed a subsequent motion to amend adding *Ring v. Arizona*[3], on July 8, 2003. The district court denied the Motion on January 29, 2004 in a single paragraph, stating only that the Motion was denied. Subsequently, Jackson filed a successive 3.851 motion based upon *Hurst v. Florida* and *Hurst v. State*. The successive motion was subsequently summarily denied without a case management conference. Jackson has *never* had a postconviction evidentiary hearing. This appeal followed. This Court issued an Order to Show Cause and this response follows. Jackson requests that the Court permit full briefing in this case[4].

ARGUMENT

I. Jackson is entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under fundamental fairness because Jackson raised Sixth Amendment challenges to the sentencing scheme prior to his trial in 1986 and should be entitled to have his constitutional challenges heard.

The United States and Florida Constitutions cannot tolerate the concept of "partial retroactivity," where similarly situated defendants are granted or denied the

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[1] *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).
[2] This was the first opportunity to do so.
[3] *Ring v. Arizona*, 536 U.S. 584 (2002).
[4] Depriving Jackson the opportunity for full briefing in this matter would constitute arbitrary deprivation of the vested state right to mandatory plenary appeal in capital cases. See *Doty v. State*, 170 So.3d 731, 733 (Fla. 2015).

benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. The *Hurst* decisions apply retroactively to Jackson under the equitable "fundamental fairness" retroactivity doctrine, which the Florida Supreme Court ("Court") has applied in cases such as *Mosley*[5] and *James v. State*, 615 So. 2d 668 (Fla. 1993). This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Jackson the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Jackson *Hurst* retroactivity because his death sentence became final in 1989, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he 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.")

[5] *Mosley v. State*, 209 So.3d 1248 (2016).

(Stewart, J., concurring). In other words, the death penalty cannot be imposed in certain cases in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308. This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief.

Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether this Court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[6] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release;[7] whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of

[6] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).
[7] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Booker's death sentence would have become final after *Ring*.

certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring*-based retroactivity approach include whether a resentencing based on relief was granted because of an unrelated error. Under the Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision). Under this Court's approach, a defendant who was originally sentenced to death before Jackson, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Jackson would not.

Moreover, under the Court's current rule, some litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture. *See. e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).[8] Making *Hurst* retroactive to only post-*Ring* sentences

[8] Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst* should receive the retroactive benefit of *Hurst* under this Court's "fundamental

also unfairly denies *Hurst* access to defendants who were sentenced between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*. The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. *See Ring*, 536 U.S. at 588-89. And in *Hurst*, this Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. This Court itself has acknowledged that *Ring* was an application of *Apprendi*. *See Mosley*, 209 So. 3d at 1279-80. This Court's drawing of its retroactivity cutoff at *Ring* instead of *Apprendi* represents the sort of capriciousness that is inconsistent with the Eighth Amendment.

Mr. Jackson is also entitled to the retroactive effect of both *Hurst* decisions under federal law. 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 v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of

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fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g.*, *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived.").

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*, this Court announced two substantive constitutional rules. *First*, this Court held that the 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. *Second*, this Court determined that the Eighth Amendment required that the jury's fact-finding during the penalty phase be unanimous. The function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. That makes the rule substantive. *Hurst v. State* held that the "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." Such findings are manifestly substantive.[9] *See Montgomery v. Louisiana*, 136 S.Ct. at 734

[9]In contrast, in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989)—the basis of *Hurst v. Florida*—was not retroactive on federal collateral review because the requirement that the jury rather than the judge make findings as to whether a defendant had a prior violent felony aggravator was procedural rather than substantive. *Summerlin* did not review a capital sentencing statute, like Florida's, that required the jury not only to make the fact-finding regarding the applicable aggravators, but also required the jury to make the finding as to whether the aggravators were *sufficient* to impose death. Moreover, *Hurst*, unlike *Ring*,

(holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Because the Sixth and Eighth Amendment rules announced in *Hurst v. State* are substantive, Jackson is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

In Jackson's case in particular, it would be unjust and fundamentally unfair for *Hurst* to not apply to him, especially in light of the fact that during the pendency of his trial, appeal, state post-conviction proceedings, and his federal habeas corpus proceedings, Jackson raised a *Ring*-like claim that his non-unanimous death sentence violated the Sixth, Eighth and Fourteenth Amendments. Prior to trial, Jackson challenged the constitutionality of Florida's death sentencing statute "because the jury recommendation need not be unanimous thereby depriving the defendant of the right to due process and to a unanimous verdict in violation of Article I, sections 9, 16, and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution." TR 1:63; SPC 1:31. He further argued that for the jury to recommend death, the jury should be instructed that it must be "convinced beyond every reasonable doubt that the aggravating

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addressed the proof-beyond-a-reasonable-doubt standard which the Supreme Court has always regarded as substantive. See *Powell v. Delaware*, 153 A. 3d 69, 74 (Del. 2016)(*Schriro* only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, the applicable burden of proof).

circumstances outweigh any mitigating circumstances." TR 1:64; SPC 1:32. Finally, he argued in that same motion that the statute was unconstitutional because "the jury is not required to list specific aggravating circumstances they have found beyond a reasonable doubt" and "[t]his permits the trial judge when imposing the sentence to consider and find aggravating circumstances that the jury did not." TR 1:65; SPC 1:33. At the time this pre-trial motion was filed, *Apprendi* and *Ring* had not yet been decided. Jackson was denied relief at that time and he has been denied relief ever since[10].

As Justice Lewis noted in his concurrence in *Asay*, he agreed that *Asay* was not entitled to relief, because *Asay* did not raise a Sixth Amendment challenge prior to *Ring*.[11] However, he noted that petitioners who did preserve the Sixth Amendment issue, "should also be entitled to have their constitutional challenges heard." See *Asay* at 21 (Lewis, J. concurring). "Accordingly, the fact that some defendants specifically cited the name *Ring* while others did not *is not dispositive*. Rather, the proper inquiry *centers on whether a defendant preserved his or her substantive constitutional claim* to which and for which *Hurst* applies." *Id*.

[10] Not only denied relief, but never afforded the opportunity to actually have a hearing on any of his claims in postconviction.

[11] The decision in *Hitchcock* notes that Mr. Hitchcock preserved Sixth Amendment challenges after *Apprendi* was decided. In light of the fact that these issues were preserved from the beginning of his case, Mr. Jackson asserts that neither *Asay* or *Hitchcock* should apply to him, as he preserved pre-*Ring* arguments prior to *Apprendi* and *Ring* and his constitutional challenges should be heard.

(emphasis added). Justice Lewis reiterated this in his concurrence in *Hitchcock*[12]. Jackson did **exactly** what Justice Lewis contemplated and preserved a pre-*Ring* Sixth Amendment challenge[13]. He raised the issue pre-trial and preserved the issue in his appeals. This is the exact situation that should merit *Hurst* relief, irrespective of whether the case came before or after *Ring*. "[T]hose defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge." *Id*.

To deny Jackson the application of *Hurst* now, would result in an arbitrary and capricious result that also violates the Eighth Amendment. Furthermore, Jackson was sentenced to death on the barest of majorities, seven to five, which, pursuant to *Hurst* is both a violation of the Sixth and Eighth Amendments. Finally, Jackson's death sentence should be vacated because it was obtained in violation of the Florida Constitution. 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. In addition to Florida's jury trial right, this Court found that the Eighth Amendment's evolving standards of decency and the bar on the arbitrary and capricious imposition of the

[12] *Hitchcock v. State*, 2017 WL 3431500 *2 (Fla. 2017) (Lewis, J. concurring).
[13] He also preserved challenges under the corresponding provisions of the Eighth Amendment and Florida Constitution.

death penalty require a unanimous jury fact-finding. *Hurst v. State*, 202 So. 3d at 59–60. Jackson should benefit, as he raised this argument prior to his trial in 1986.

As noted above, Jackson, unlike Hitchcock, raised *Ring*-like claims at his first opportunity during his pre-trial proceedings, direct appeal and later in his post-conviction motion, even though at the time of his direct appeal and motions for post-conviction relief, *Ring* and *Apprendi* did not exist. Jackson raised these *Ring*-like claims in his federal petition for habeas corpus as well, and then cited and briefed *Ring* and *Apprendi* in his federal habeas pleadings when they issued. In this case, the interests of finality must yield to fundamental fairness. Jackson, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst v. Florida* and *Hurst v. State*, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Jackson "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley* at 1282. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the *Hurst* decisions in this case. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the full retroactive application of *Hurst* and the resulting new Florida law.

To deny Jackson retroactive relief under *Hurst v. Florida* on the ground that his death sentence became final before June 24, 2002 under the decisions in *Hitchcock v. State*, 2017 WL 3431500 (Fla. 2017) and *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had no become final on June 24, 2002 under the decision in *Mosley*, violates Jackson's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)). As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Jackson violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures[14].

[14] *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

II. The error in Jackson's case is not harmless.

The procedure employed when Jackson received a death sentence at his sentencing deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury's verdict authorizing a death sentence to be unanimous or else a life sentence is required, rather than a judge imposed sentence. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each *juror* is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So. 3d 40, 58 (Fla. 2016). The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Jackson's case. The State must show beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Jackson by voting for a life sentence. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error was harmless in Jackson's case.

In Jackson's case, one of the aggravators was struck by this Court. See *Jackson v. State*, 530 So.2d 269, 274 (1988). The trial court in Jackson's case found five aggravating circumstances and no mitigating circumstances, despite evidence

presented to the contrary. *Id*. at 271. This Court found the "application of cold, calculated, and premeditated (CCP) as an aggravating circumstance was error…." *Id*. at 273. Further, the evidence presented during the trial did "not establish the heightened degree of prior calculation and planning required by our *Rogers*[15] decision." *Id*. Justice Pariente recently addressed this situation in her dissent in *Middleton v. State*, 2017 WL 2374697 *1 (Fla. 2017). Under the rubric of *Hurst*, "we must focus on how the stricken aggravating factors could have affected the jury's recommendation for death." *Id*. at *2. CCP "is amongst the most serious aggravators set out in the statutory sentencing scheme." See *Wood v. State*, 209 So.3d 1217, 1228 (Fla. 2017), quoting *Deparvine v. State*, 995 So.2d 351, 381 (Fla. 2008). Because Jackson's jury was instructed on an aggravator that this Court determined was not supported by competent, substantial evidence, "this Court must consider the impact that the inappropriate aggravating factors had on the jury's ultimate verdict in determining whether *Hurst* error was harmless beyond a reasonable doubt." *Middleton* at *2.

Further, Jackson's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that the

[15] *Rogers v. State*, 511 So.2d 526 (Fla. 1987).

each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State*[16]. Mr. Jackson's jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed." TR IV:704. Post-*Hurst*, the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentenced to be vacated. *Caldwell*, 472 U.S. at 341. Jackson's death sentence likewise violates the Eighth Amendment under *Caldwell*.

In this matter, the error is far more apparent, as Jackson was sentenced to death on a mere majority recommendation of 7 to 5. There is no unanimous jury vote to rely upon to state that there was no harmless error. Based upon the record in this case, it would be sheer speculation to assume that the jury would have unanimously sentenced Jackson to death, had they only been instructed on the valid aggravating factors. Furthermore, all we have on the record is the trial court's

[16] *Perry v. State*, 210 So.3d 630 (Fla. 2016).

finding that there were no mitigating circumstances found. Clearly, the jury recommendation undermines this assertion, as five jurors voted against recommending death. In Jackson's case, the State cannot sustain its burden in light of the non-unanimous recommendation and the stricken aggravating circumstance.

III. Jackson's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and should be vacated.

In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed." *Hurst v. State*, 202 So.3d 40, 61 (Fla. 2016). Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a

death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("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."). Jackson's death sentence likewise violates the Eighth Amendment under *Caldwell*. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330. In Jackson's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions, especially since five jurors voted originally for life.

In *Hurst v. Florida*, the United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict cannot be used as a

substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court's Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme[17].

IV. Jackson's death sentence should be vacated because it was obtained in violation of the Florida Constitution.

Finally, Jackson's death sentence should be vacated because it was obtained in violation of the Florida Constitution. On remand in *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required

[17] See *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in *Hitchcock*, "[f]or the same reasons I conclude that the right announced in *Hurst* under the right to jury trial (Sixth Amendment and article I, section 22, of the Florida Constitution) requires full retroactivity, I would conclude that the right to a unanimous jury recommendation of death announced in *Hurst* under the Eighth Amendment requires full retroactivity." *Id*. at *4. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Id*. at *3. The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.)

that all factual findings be made by the jury unanimously under the Florida Constitution. In addition to Florida's jury trial right, this Court found that the Eighth Amendment's evolving standards of decency and the bar on the arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding. *Hurst v. State*, 202 So. 3d at 59–60. Jackson should benefit.

The increase in penalty imposed on Jackson was without any jury at all. 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." Lastly, there was no "unanimity in the final jury recommendation for death." This was a further violation of Florida Constitution. Jackson had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Jackson's death sentences based on the Florida Constitution. Article I, Section 15(a) provides:

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

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

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

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 (1999). Because the State proceeded against Jackson under an unconstitutional system, the State never presented the aggravating factors, like robbery, as elements for the Grand Jury to consider in determining whether to indict Jackson. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Jackson was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Jackson 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. Mr. Jackson's death sentence must be vacated and a life sentence substituted, or in the alternative he should receive a new penalty phase.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Jackson relief on his successive 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new penalty phase, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com, cappapp@myfloridalegal.com, on this 12th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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