IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS, **CASE NO. SC17-945**

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, Appellant, Glen Edward Rogers, by and through undersigned counsel, and responds to this Court's September 25, 2017 Order to Show Cause. In this Court's Order, the appellant was tasked with showing cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445. The trial court's order should be reversed. In sum, *Hitchcock* does not address a number of matters pertaining to why Mr. Rogers should receive relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the progeny derived from this Court.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This pleading addresses whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring v. Arizona*, 536 U.S. 583 (2002), rather than restricting *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, non-truncated rules of appellate practice.

Depriving Appellant 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).

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record on appeal are of the form (R. p. 123). Glen Edward Rogers is referred to as Mr. Rogers, the appellant, or Appellant.

Relevant Procedural History

Due to page constraints, Appellant will rely on the procedural history articulated in the Second Successive Motion to Vacate Death Sentence, filed on January 9, 2017. (R. p. 116-18).

ARGUMENT

HITCHCOCK V. STATE SHOULD NOT PRECLUDE A REVERSAL OF THE TRIAL COURT'S ORDER DENYING RELIEF. MR. ROGERS' CASE IS DISTINGUISHABLE FROM *HITCHCOCK* AND SHOULD BE DECIDED ON THE MERITS OF THE POSTCONVICTION CLAIMS PRESENTED

Fundamental Fairness

Pursuant to *Mosley v. State,* 209 So.3d 1248 (Fla. 2016), this Court ruled that those defendants whose cases became final after *Ring* are entitled to retroactive application of *Hurst v. State* 202 So.3d 40 (Fla. 2016). By denying Mr. Rogers retroactive application of *Hurst v. State*, solely due to the fact that his case was final prior to *Ring*, this Court is administering justice in an arbitrary and capricious manner. *See Asay v. State*, 210 So.3d 1 (Fla. 2016)

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. "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." *See Asay* at 38 (Perry, J., dissenting). Along those same lines, this Court has given retroactive *Hurst* relief in cases where the actual crimes and trial occurred years prior to other cases in which retroactive application was denied. 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* 162 So.3d 954, 962 (quoting *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1980)). 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.

Although Appellant received a unanimous death recommendation from a mere advisory panel, this Court should consider the evolution in the penalty phase mitigation presented since that recommendation in 1997. For example, *Wiggins v. Smith*, 539 U.S. 510 (2003), expanded the scope of what is considered "effective assistance of counsel" in assuring that a capital defendant's Sixth Amendment rights are protected. Mere reliance on a calendar is arbitrary, capricious, and denies Mr. Rogers the constitutional protections mandated in *Furman v. Georgia* 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Pre-*Ring* defendants do not differ from post-*Ring* defendants in that they both were sentenced under an unconstitutional scheme that allowed death sentences to be founded upon factual findings not tested by a jury trial. However,

they do differ in ways that are more important than the *Ring* cut-off date used by this Court in analyzing which of these defendants should have *Hurst v. Florida* and *Hurst v. State* apply to them retroactively:

a) In having been sentenced longer, they have demonstrated the ability to adjust to a prison setting without continuing to endanger any valid State interest;

b) They have suffered long from the anxiety and uncertainty of having the death sentence hanging over their head for an unconscionable number of years;

c) They are less likely than their post-*Ring* counterparts to have had the same quality of mitigation presented on their behalf, as the law and attorney training continues to improve for defendants facing a death sentence; and

d) Over the past two decades there has been recognition of the wide ranging unreliability of many kinds of evidence, from flawed forensic-science theories and practices to hazardous eyewitness identification testimony.

These considerations have not been taken into account by this Court in performing their *Witt* analysis in *Asay*. Mr. Rogers' sentence of death is particularly problematic in that his sentence was upheld on appeal by a mere 4 to 3 split before this Court. *Rogers v. State*, 783 So.2d 980 (Fla. 2001).

Federal Law Mandates Retroactive Relief

"There must be consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). Denying Appellant retroactive

relief under *Hurst*, on the ground that his death sentence became final prior to *Ring*, in relying on *Asay* and *Hitchcock*, while granting retroactive *Hurst* relief to inmates whose death sentences had not become final by the *Ring* decision, pursuant to *Mosley*, violates the appellant's right to Equal Protection of the Law under the 14th Amendment to the United States Constitution. (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 8th Amendment to the United States Constitution (e.g. Godfrey v. Georgia, 446 U.S. 420 (1980), *Espinosa v. Florida*, 505 U.S. 1079 (1992) per curium))." The court in *Skinner* used a strict scrutiny analysis to determine that the state's compulsory sterilization law discriminated against those who committed similar crimes. *Skinner* at 541. In the case at bar, a liberty interest in one's life is at stake as this Court is using a calendar to parse out those defendants who committed the same or similar crimes.

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.") (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;[1] 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;[2] 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

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1 *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*).

2 *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*, Mr. 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. Mr. Rogers would like to particularly make note of the fact that his case became final on July 23, 2001, 90 days after this Court denied his motion for rehearing. *Rogers v. State*, 783 So.2d 980 (Fla. 2001, Rehearing denied April 24, 2001). Mr. Rogers' appellate attorney never filed a writ of certiorari to the United States Supreme Court, which may have be the sole reason why his case is pre-*Ring*.

Also, this Court held that the 8th 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* 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 5th and 14th 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 6th 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 8th 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 8th Amendment unanimity requirement, in addition to the 6th 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. Rogers 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 38 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718, 731-32 (2016) 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 v. State,* 162 So.3d 954 (Fla. 2015). 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 6th 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 8th 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.

Because this Court is bound by the federal constitution, it has the obligation to address Appellant's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S.

386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816). Addressing those claims meaningfully in the present context requires full briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court disregarded them. To dismiss this appeal on the basis of *Hitchcock* would compound that error.

Additionally, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury, pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), must be correctly instructed as to its sentencing responsibility. This means that 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. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Otherwise, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988). This matter is particularly relevant in light of the fact that Mr. Rogers' case became final after *Apprendi v. New Jersey*, 533 U.S. 466 (2000).

The Beyond a Reasonable Doubt Standard Requires Retroactive Relief

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.
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> 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. at. 204–05

In *Mullaney v. Wilbur*, 421 U.S. 684 (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.* 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 (1977). *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Thus, retroactive application is required.

Relief Pursuant to the Florida Constitution

Mr. Rogers never had a legitimate fact-finding jury. A death sentence recommended by a mere advisory panel does not pass constitutional muster. Florida's unanimity requirement and grand jury requirement predate Mr. Rogers. Additionally, retroactivity would not be an issue under this analysis pursuant to *Teague*. As found in guidance provided by *Stringer v. Black*, 503 U.S. 222, 228 (1992), the right to a trial by jury and a unanimous verdict is not a "new rule" announced by *Hurst v. State*. In requiring a unanimous verdict for a death sentence, this Court did not break new ground. *Hurst v. State*, for the purposes of *Teague*, is a right already controlled by the Florida Constitution and historical jurisprudence in this state. The precedent already existed at the time Mr. Rogers' sentence became final. *See Stringer* at 229. As stated in *Stringer*, "the purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents." *Id.* at 237.

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 at 44.

In *Perry v. State*, 210 So.3d 630 (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. 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."). 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 at 633–34 (footnotes omitted)

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. Rogers 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*. Mr. Rogers received even less of a constitutional procedure than that which this Court found unconstitutional in the new statute, which was revised and replaced with Chapter 2017-1. Mr. Rogers' unanimous recommendation resulted from a mere advisory panel, which did not understand the full nature of its rights and responsibilities. For example, this Court emphasized in *Perry* the importance of the *mercy* recommendation:

> It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors

> outweigh the mitigating circumstances. *See*, e.g., *Cox v. State*, 819 So. 2d 705, 717 (Fla. 2002) ('[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'(Citation omitted)

Perry v. State, 210 So.3d at 640.

Moreover, Mr. Rogers 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. Rogers'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, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed…

An impartial jury in the state of Florida, historically, has always required a unanimous verdict from a legitimate fact-finding jury. 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, (1999). Because the State proceeded against Mr. Rogers 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. Rogers.

Mr. Rogers was denied his right to a proper grand jury indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Rogers 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. Rogers' death sentence because his death sentence is unconstitutional.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Rogers never received a constitutional sentencing proceeding. Confidence in the outcome is undermined and the sentence of death is unreliable. Mr. Rogers should be permitted full access to this Court. Mr. Rogers requests this Honorable Court to reverse the lower court's decision summarily denying relief, and remand for a full determination of the claims on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October 2017, I electronically filed the foregoing Response to Order to Show Cause 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, Stephen Ake, Assistant Attorney General , stephen.ake@myfloridalegal.com CapApp@myfloridalegal.com I further certify that a copy has been furnished by U.S. Mail to, Glen Rogers: DOC #379799, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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