No. 17-9588

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FINNEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF FOR PETITONER

CAPITAL CASE

SUZANNE KEFFER *
Florida Bar No. 0150177
CCRC-South
1 EAST BROWARD BLVD. SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY

Respondent asserts that the Florida Supreme Court's *Hurst* retroactivity cutoff is "based upon independent and adequate state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court." Brief in Opposition ("BIO) at 5. Respondent further contends that "[t]his decision is not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth and Fourteenth Amendments."[1] BIO at 5. Contrary to Respondent's suggestion, however, this Court can and should grant Petitioner's Petition for Writ of Certiorari raising challenges at to whether the Florida Supreme Court's *Hurst* retroactivity cutoff violates the United States Constitution.

---

[1] It is unclear as to which of the *Hurst* decisions, or both, Respondent is referring to here. Further, throughout the substance of their argument, Respondent repeatedly refers to "*Hurst*" in contexts where it is also unclear as to which of the decisions, or both, they are referring. The Respondent's sweeping reference to "*Hurst*" is also problematic because it ignores the Florida Supreme Court's failure to meaningfully address the retroactivity of *Hurst v. State*'s unanimity requirement to the pre-*Ring* cases. The Florida Supreme Court continues to deny important Eighth Amendment claims by citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), but as Justice Pariente recognized in her *Hitchcock* dissent:

> This Court did not in *Asay*, however, discuss the new right announced by this Court in Hurst [v. State] to a unanimous recommendation for death under the Eighth Amendment. Indeed, although the right to a unanimous jury recommendation for death may exist under both the Sixth and Eighth Amendments, the retroactivity analysis, which is based on the purpose of the new rule and reliance on the old rule, is undoubtedly different in each context. Therefore, Asay does not foreclose relief in this case, as the majority opinion assumes without explanation.

226 So. 3d at 220. (Pariente, J., dissenting) (emphasis added). The Florida Supreme Court has yet to address Eighth Amendment claims in any meaningful way.

In arguing that the Florida Supreme Court's *Ring-v. Arizona*, 536 U.S. 584 (2002) based retroactivity cutoff is somehow immune from this Court's review, Respondent misapplies the independent and adequate state grounds doctrine. BIO at 5; 9; 13. Respondent contends that Florida's application of its state law retroactivity test under *Witt v. State*, 387 So. 2d 933 (Fla. 1980) is a matter of state law. BIO at 9. Relying upon *Danforth v. Minnesota*, 552 U. S. 264 (2008), Respondent argues that Florida's implementation of a test for retroactivity under *Witt* instead of the federal test under *Teague v. Lane*, 489 U.S. 288 (1989), is constitutional where it provides for relief to a broader class of individuals. BIO at 9. Respondent's reliance upon *Danforth v. Minnesota*, however, misconstrues this Court's holding in that case.

This Court has consistently held time and time again, under the Supremacy Clause state law must be interpreted in conformity with federal law. This means state courts cannot randomly deprive people of vested rights endowed by the federal constitution. As this Court explained in *Danforth*, an exception to the conformity requirement is when states choose to provide ***more*** protection than federal law requires. *Danforth*, 552 U.S. at 282. (emphasis added). In choosing to provide more protection than federal law requires, States are not limited by federal retroactivity holdings that operate to deny relief to its citizens and can expand such protections for their benefit. *Id.* ("In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "non-retroactive" under

Teague.). But while a State court is free to employ a partial retroactivity approach without violating federal constitutional law, there are limits. States are not free to simply employ any manner of partial retroactivity without adherence to a defendant's constitutional rights.

And while this Court will not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgement," *Coleman v. Thompson*, 501 U.S. 722 (1991), it does not provide immunity to all state court rulings that claim to have based their decisions on state law. State court rulings are only "independent" and unreviewable where the state law basis for denial of a federal constitutional claim is separate from the merits of the federal claim. *See Foster v. Chapman*, 136 S. Ct. 1737, 1759 (2016); *see also Michigan v. Long*, 463, U.S. 1032, 1037-44 (1983).

The federal question that has been presented by Petitioner in this case is whether the Florida Supreme Court's partial retroactivity approach utilizing *Ring* as a cutoff point violates the Eighth and Fourteenth Amendments. The application by the Florida Supreme Court of its *Ring*-based partial retroactivity based on its state-law *Witt* analysis is not, and cannot, be independent of Petitioner's federal constitutional claims under the Eighth and Fourteenth Amendments. The state court ruling provided by the Florida Supreme Court is inseparable from the merits of Petitioner's federal constitutional claim raised in the state courts below. *See Foster*, 136 S. Ct. at 1759.

In this Court's seminal decisions in both *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court noted that where a State wishes to impose capital punishment it is constitutionally required to tailor and apply its laws in a manner which avoids the arbitrary and capricious imposition of the death penalty. *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment jurisprudence has "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). Thus, State's do not enjoy unfettered discretion in the employment of state retroactivity cutoffs, particularly where such rulings have the effect of creating different classes of condemned prisoners with no discernable differences.

This Court has also long recognized the need for treating similarly situated litigants alike. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). This Court's precedent has established that the Eighth Amendment bars the "arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). In those states where death is an available penalty, the State is required to administer the penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and for those for whom it is not. *See Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*; *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Eighth Amendment principle is consistent with, and also further informed by, the constitutional right to equal protection under the Fourteenth Amendment. Under the Fourteenth Amendment this Court has held that where the "law lays an unequal hand on those who have

committed intrinsically the same quality of offense and…[subjects] one and not the other" to a uniquely harsh form of punishment, such disparate treatment violates the right to equal protection. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In drawing its dividing line for purposes of *Hurst* relief, the Florida Supreme Court's partial retroactivity approach violates both of these Eighth and Fourteenth Amendment precepts.

Whether or not the Florida Supreme Court's retroactivity cutoff goes beyond the bounds permissible under the Eighth and Fourteenth Amendments is a federal question controlled by federal law, and therefore, should compel this Court to grant certiorari in order to review that question.

In arguing that the Florida Supreme Court ruling on retroactivity of the *Hurst* decisions is not unconstitutional, Respondent further contends the *Ring*-based cutoff is not unconstitutional because *Hurst v. State's* requirement that the jury make specific factual findings before the imposition of the death penalty is procedural rather than substantive. BIO at 8. To arrive at this contention, Respondent selectively parses a portion of this Court's opinion in *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) and twists its meaning to fit their tortured logic. Their argument, however, is both unsound and misleading.

In making this argument Respondent correctly notes that this Court has not ruled on whether unanimity is required in capital cases, BIO at 8, However, Respondent ignores that in *Hurst v. State* the Florida Supreme Court expressly ruled that it was required in capital cases in Florida under both the Florida Constitution

and the Eighth Amendment. *Hurst v. State*, 202 So. 3d 40 (2016). The court's holding was rooted in the understanding that under Florida's capital sentencing scheme, where the jury was required to make specific factual findings as to the existence of aggravators, the sufficiency of the aggravators to impose death, and whether the aggravators outweighed the mitigation, such findings were required to be unanimous under both the Florida Constitution and the Eighth Amendment. *Id.* at 57-58. Thus, because the Florida Supreme Court ***has provided*** for juror unanimity in capital sentencing ***under Florida's capital sentencing scheme***, the focus of the issue here is not whether this Court has found juror unanimity to be required under federal law in *Ring,* or some other case. Rather, it is whether denial of that recognized right to some and not others through the Florida Supreme Court's *Ring*-based partial retroactivity framework under state law, violates the Eighth and Fourteenth Amendment.

Respondent's argument in this regard seems to be either consistently unwilling to engage with this point, or missing it all together. This Court's opinion in both *Ring v. Arizona,* 536 U.S. 584 612 (2002) and *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), two of the cases on which Respondent relies, dealt with the factual determinations which were required under Arizona's capital sentencing statute, not Florida. Both *Schriro* and *Ring* dealt with review of Arizona's capital sentencing scheme's requirement of jury fact-finding as to one aggravating factor in order to render a defendant eligible for a sentence of death. Comparatively, this Court's decision in *Hurst v. Florida*, and subsequently the Florida Supreme Court's holding

in *Hurst v. State*, were concerned with the jury's role at sentencing under Florida law and Florida's capital sentencing scheme, not Arizona.

Unlike the system in Arizona, Florida's capital sentencing scheme requires jury fact finding beyond the existence of one mere aggravator. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court reviewed Florida's death penalty, and concluded "[w]e hold this sentencing scheme unconstitutional," because "[t]he Sixth Amendment requires a jury, not a judge, ***to find each fact necessary to impose a sentence of death***." *Id.* at 619 (emphasis added). The Court identified those critical factfindings, leaving no doubt as to how the statute must be read under the Sixth Amendment: "the Florida sentencing statute does not make a defendant eligible for death ***until findings*** . . . ***[of] sufficient aggravating circumstances*** . . . ***and . . . insufficient mitigating circumstances to outweigh the aggravating circumstances***." *Id.* at 622 (citing Florida Statutes § 921.141(3)) (quotations omitted). *Hurst* identified these findings as the operable findings that must be made by a jury. *Hurst* resolved that "[a] jury's mere recommendation is not enough." *Id.* at 619.

The basis for the Sixth Amendment requirement is that findings of fact statutorily required to render a defendant death-eligible must be considered to be elements of the offense, separating first degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

indictment, submitted to a jury, and proven beyond a reasonable doubt" to state sentencing schemes under the Fourteenth Amendment). There is no conviction of capital murder in Florida without the jury findings required by *Hurst*.

Yet, in the wake of *Hurst v. State* and the Florida Supreme Court's interpretation of *Hurst v. Florida* therein, the issues now presented are well beyond that initial distinction. In *Hurst v. State*, the Florida Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. The Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

> We hold 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. * * * As we explain, we also find that in order for a death sentence to be imposed, **the jury's recommendation for death must be unanimous.** This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and **under explicit Florida law, jury verdicts are required to be unanimous.**

202 So. 3d at 54. Such findings are inherently different from those provided under the Arizona statute under review by this Court in both *Ring* and *Schriro*.

Moreover, unlike the holdings in *Schriro* or *Ring,* the *Hurst* decisions announced substantive rules which the federal Constitution protects against being denied to Florida defendants on state retroactivity grounds. The Florida Supreme Court's holding in *Hurst v. State* that the Sixth Amendment requires a jury to decide whether the aggravating factors have been proven beyond a reasonable doubt,

whether they are sufficient to impose death, and whether they are outweighed by the mitigating factors are manifestly substantive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that the determination whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Similarly, the Florida Supreme Court's holding in *Hurst v. State* that the Eighth Amendment requires unanimous jury fact-finding at the penalty phase is likewise substantive. We know this because the court explained as much, holding that the unanimity rule was required to implement the constitutional mandate that the death penalty be reserved for a narrow class of only the worst of offenders and to assure the determination of the jury "express that values of the community as they currently relate to the death penalty." *Hurst*, 202 So. 3d at 60-61. ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). The function of the unanimity rule is to ensure Florida's overall capital system complies with the Eighth Amendment. Such rulings are also manifestly substantive, regardless of the fact that they deal with the method by which a jury decides. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"); *see also Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in

determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

The change in Florida's sentencing law was not simply transferring factfinding duties from a judge to a jury. Unlike the circumstances in *Schriro v. Summerlin*, 542 U.S. 348 (2004) the change here includes going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a jury to return a unanimous death verdict before a judge has the power to impose a death sentence. Going from a majority vote to a unanimous verdict is akin to going from proof by a preponderance of the evidence to proof beyond a reasonable doubt. It is a change designed to make a decision to impose a death sentence more reliable. *See Addington v. Texas*, 441 U.S. 418, 423 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"). This change is tantamount to the guilt phase presumption of innocence that can only be overcome by a unanimous jury's verdict finding that the State carried its burden to prove guilt beyond a reasonable doubt.

Furthermore, this Court addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right in *Hurst v. Florida*, and this Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See In re Winship*, 397 U.S. 358 (1970); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016)

(holding *Hurst* retroactive under Delaware's state *Teague*-like 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."). Respondent's attempt to analogize this Court's holding in both cases with those in the *Hurst* decisions is flawed and obfuscates the distinction between the two state's capital sentencing statutes and the attendant substantive constitutional rights provided within.[2]

Respondent next argues that the Florida Supreme Court's partial retroactivity is immune from this Court's review because the Florida Supreme Court has consistently applied its *Ring*-based partial retroactivity cutoff since its holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Therefore, Respondent contends the

---

[2] Respondent's argument also mistakenly and clumsily conflates the issue of jury unanimity and the right to jury sentencing. BIO at 8. The Florida Supreme Court's ruling in *Hurst v. State* dealt with the right to jury unanimity under Florida's capital sentencing scheme, not whether there was a right independently to jury sentencing under the United States Constitution. Moreover, Respondent's argument also ignores that the right to a unanimous jury sentencing recommendation ***in a capital case*** was not the issue before the Court in the cases cited by Respondent. This Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972) dealt with whether a state court conviction of a ***non-capital crime*** by less than unanimous jury recommendation violates the right to trial by jury under the Sixth and Fourteenth Amendments. This Court ultimately determined that the accused's right to a jury trial does not require that juries return unanimous decisions in order to convict a defendant.in a non-capital case. This Court's decision in *Johnson v. Louisiana*, 406 U.S. 356 (1972) dealt with whether the Louisiana Constitution's provision permitting conviction of the ***non-capital*** crime of ***robbery*** by a vote of 9-3 violates the Due Process Clause found within the Fourteenth Amendment of the United States Constitution. The Court determined that non-unanimous jury recommendations do not violate the reasonable doubt standard found within the Fourteenth Amendments Due Process Clause. Both cases are inapplicable to the discussion here, as neither dealt with capital crimes and the heightened constitutional requirements in such cases under the Eighth Amendment.

distinction between cases final pre-*Ring* and post-*Ring* is neither arbitrary or capricious in violation the Eighth or Fourteenth Amendments. BIO 11. This argument, however, overlooks that the Florida Supreme Court has failed to provide any meaningful discussion as to whether its cutoff violates both the Eighth and Fourteenth Amendments. While Respondent dutifully produces portions of the holdings in both *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248 (2016), its argument fails to acknowledge that neither case addresses Petitioner's federal constitutional arguments.

In *Mosely v. State*, the court described its rationale for imposing a *Ring*-based retroactivity cutoff as follows: "Because Florida's capital sentencing statute has been essentially unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time." 209 So. 3d 1248, 1280 (Fla. 2016). This Court's decision in *Ring,* however, recognized that Arizona's capital sentencing scheme was unconstitutional, not Florida. Florida's capital sentencing statute was always unconstitutional and any attempt at rationalizing a basis for which to provide relief for that constitutional infirmity to some death sentenced defendants and not others, ignores that fact.

This Court's ruling in *Hurst v. Florida* dealt with the Sixth Amendment requirement of jury fact finding as to as to all the elements of capital first degree murder. The Florida Supreme Court's subsequent holding in *Hurst v. State*, recognized that Sixth Amendment right, but also further acknowledged the right to juror unanimity based upon the Florida Constitution and the Eighth Amendment.

The court's Eighth Amendment holdings were not part of this Court's holding in *Hurst v. Florida* or *Ring,* which were Sixth Amendment cases. Thus, it was impossible for this Court's decision in *Ring* to have preconfigured the Florida Supreme Court's opinion in *Hurst v. State*. Therefore, any retroactivity analysis which attempts to draw the cutoff on the basis of the decision in *Ring*, where the Eighth and Fourteenth Amendment rights at issue were not even part of the analysis, is logically unsound.

Last, Respondent argues that it would be inappropriate in this case to grant certiorari review because any *Hurst* error in Petitioner's record would be harmless beyond a reasonable doubt. BIO at 13. Respondent relies upon the aggravating circumstances found by the trial court that Petitioner had been convicted of a violent felony and that the murder was especially heinous, atrocious, or cruel.[3] Respondent's argument, however, is without merit.

In rejecting such a one size fits all approach to review of *Hurst* errors, the Florida Supreme Court has repeatedly rejected the idea that a judge's finding as to the existence of either aggravating factor inoculates a potential *Hurst* error from harmless error review. *See Franklin v. State*, 202 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklins' death sentence from *Ring* and *Hurst v. Florida*."); *see also*

[3] Respondent only lists here two of the three aggravators found by the trial court. Along with the two mentioned by Respondent, the trial court also found the existence of the 'pecuniary gain' aggravator. For purposes of correctly reflecting the record to this Court, Respondent notes the finding by the trial judge as to the additional aggravator.

Mosley, 209 So. 3d at 1284; (finding that the *Hurst* error was not harmless despite the fact of Mosely's conviction of a prior violent felony).

Harmless error review must necessarily include a case-by-case, fact specific inquiry into the potential error. *Reynolds v. State*, __ So. 3d __, 2018 WL 1633075 at *3 (Fla. April 5, 2018). The test for harmless error is to be 'rigorously applied' and the State bears a heavy burden as the beneficiary of the error to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for the imposition of the death penalty did not contribute to the sentence at issue. *Mosley*, 209 So. 3d at 1283; citing *Hurst v. State*, 202 So. 3d 40, 68 (2016). Review for harmless error should focus on the effect which any potential error may have had on the jury. The Florida Supreme Court has noted that factors which are instructive are whether there was a unanimous jury recommendation, the jury instructions which were provided, whether a mercy instruction was given, and review of the aggravators and mitigators. *See Reynolds*, __ So. 3d. __ 2018 WL 1633075 at *3-4.

Here the jury did not make the requisite findings of fact that *Hurst* requires a jury to find in order to impose a sentence of death. First, Petitioner's jury recommendation was not unanimous as it was a 9-3 recommendation. Second, the jury instructions which were provided to Petitioner's jury repeatedly instructed them that their role was merely advisory and that the final decision as to whether death was to be imposed rested with the judge, not them. (ROA Vol. VI at 818, 917, 919). Also, no mercy instruction was provided to Petitioner's jury. Last, comparison of the aggravators and mitigators in Petitioner's case do not support a finding beyond a

reasonable doubt that a jury would have unanimously found there were sufficient aggravating factors that outweighed the mitigating circumstances. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2017). Petitioner's case was not the most aggravated and least mitigated of crimes. *See Hurst*, 202 So. 3d at 60. (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.).

Consideration must be given to the mitigating evidence presented by the defense. Although the judge only gave some weight to the mitigating factors, the jury would have been free to conclude that the defense had established the existence of the non-statutory mitigating factors which the defense argued were present in Mr. Finney's case. Consideration must be given, not only to the mitigation presented, but also to the mitigation that went unpresented due to ineffective assistance of trial counsel as well as the evidence that was suppressed at the time of trial. The jury should have heard the glaring accounts about the life of Charles Finney: a young child who was physically brutalized by his father and physically and sexually brutalized by his stepfather, who helplessly witnessed his stepfather violate and abuse his mother and siblings, a child who was neither safe in his home nor in a community rife with overt racism and violence towards black youth. As a young adult he attempted to escape his situation by enlisting in the Army only to encounter the same, if not worse, racism and violence. As a result of his tumultuous background, Petitioner exhibits classic symptoms of Post-Traumatic Stress Disorder, such as

avoidance, numbing and self-medication with drugs and alcohol, sleep disturbance, nightmares, flashbacks, and hyper-vigilance. Had trial counsel adequately investigated and prepared, the jury would have heard substantial evidence of statutory and non-statutory mitigating evidence.

Additionally, the jury never heard evidence that went undisclosed. Specifically, the State failed in its obligation to disclose a police report indicating other suspects and boyfriends of the victim, Sandra Sutherland, and failed to disclose two intimate letters from Sutherland to one of those boyfriends at the time of Petitioner's trial. The State also withheld information about someone named Alice Rabidue stealing from the victim, along with impeachment evidence regarding the Medical Examiner's findings. Based on the favorable evidence now known by Petitioner, state witness, Ruth Sutherland, lied on the stand when she testified that her daughter was not involved in a relationship and the State did not correct her testimony on redirect. The State argued at trial that Sandra Sutherland was a single woman who lived alone and that any inference by the defense that Sutherland's murder was a crime of passion was absurd. Ruth Sutherland testified that her daughter was not involved in a relationship. Although the postconviction court rejected Petitioner's *Brady/Giglio* claims regarding the wealth of suppressed evidence that was not presented to his jury, the jury under *Hurst* would have been free to conclude that evidence of other suspects and boyfriends raised doubt about his guilt. Although residual doubt is not mitigation, residual doubt would certainly be a reason one or more jurors might vote for mercy, even if the jury unanimously otherwise made the findings required by the

new law. The procedure employed when Petitioner received a death sentence at his 1992 trial all but insured an unreliable result.

Furthermore, 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 at 57-58 (emphasis added). Individual jurors may decide to exercise mercy and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016). The State cannot prove beyond a reasonable doubt that not one juror would have decided to be merciful and refuse to vote to recommend a death sentence.

Because *Hurst* requires a jury, not a judge, to find each fact necessary to impose a sentence of death, the error cannot be harmless where such an actual determination was not made. *Hall v. State*, 212 So. 3d 1001, 1036-37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting *Hurst v. Florida*, __ U.S. __ 136 S. Ct. 616, 619 (2016). Here, where Petitioner's jury did not return findings as to any of the factual determinations necessary to impose death, the error cannot be harmless. Any attempt to discern as much would amount to the type of speculation which has repeatedly been rejected as impermissible. *See Hurst v. State,* 202 So. 3d at 67-68 (holding that claims by prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation that the *Hurst* error did not affect the jury's recommendation). To the extent that Respondent argues that the finding of the aggravators of HAC and

Petitioner's conviction of a prior violent felony render any *Hurst* error harmless, such argument is nothing more than pure speculation and does not satisfy the requirements of *Hurst v. State*.

The decisions in *Hurst v. Florida* and *Hurst v. State* are premised upon the goal of ensuring enhanced fairness and accuracy in capital sentencing procedures. To the extent that Respondent attempts to argue that "[j]ust like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*," that contention is belied by the holdings in both decisions. BIO at 15. This Court's decision in *Hurst v. Florida* was meant to address the constitutional infirmities which resulted from the failure of Florida's capital sentencing statute to provide for jury fact-finding as to each and every fact necessary to impose death. *Hurst*, 136 S. Ct. at 619. Implicit in that holding is the understanding that extension of the beyond a reasonable doubt standard of fact finding by a jury as to each and every element necessary for the imposition of death provides greater accuracy and safeguards in reducing the risk of inaccurately sentencing someone to death. *See In re Winship*, 397 U.S. 358, 363-64 (1970) (the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error). Extending that right not just to guilt determinations but also to sentencing determinations, and specifically those which involve the determination of whether to impose a sentence of death, is an extension of that recognition. At its bottom, this Court's holding in *Hurst* v. *Florida* is about ensuring reliability in that process and adhering to the Eighth Amendment requirement that

the death penalty be imposed in a reliable and non-arbitrary manner. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Similarly, the Florida Supreme Court's holding in *Hurst v. State*, providing for juror unanimity in Florida's capital sentencing scheme, was aimed at providing greater accuracy. The court's holding was explicit that the requirement of juror unanimity was to provide for greater reliability in capital sentencing. *Hurst*, 202 So. 3d at 60. ("If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process."). Just as this Court did in *Hurst v. Florida*, the Florida Supreme Court noted that this requirement was meant to ensure the narrowing function required by the Eighth Amendment in capital cases. *Id.*

In sum, what the language from both of the *Hurst* decisions bears out is that in each case the decisions had as their aim the goal of enhancing the fairness or efficiency of death penalty procedures. Unlike the scenario presented in *Ring,* and the subsequent decision in *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004), this is not an argument comparatively as to the greater accuracy between judge or jury as the ultimate factfinder, but rather what was required under Florida's capital sentencing scheme for purposes of the Eighth Amendment where the jury is entrusted with that function. The decisions in both *Hurst* cases make clear, where that is the role assigned to the jury under a state's capital sentencing scheme, requiring the jury to return findings of fact as to each and every factual determination required to impose

a greater sentence, and doing so unanimously, enhances the fairness and accuracy of the procedures used to impose a sentence of death.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Suzanne Keffer
Suzanne Keffer*
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL – SOUTH
1 EAST BROWARD BOULEVARD, SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

August 7, 2018

* Counsel of Record