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APPENDIX

A

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Supreme Court of Florida

No. SC17-1143

HENRY PERRY SIRECI,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 31, 2018]

PER CURIAM.

We have for review Henry Perry Sireci's appeal of the circuit court's order denying Sireci's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Sireci's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Sireci's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

Court decided Hitchcock, Sireci responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Sireci's response to the order to show cause, as well as the State's arguments in reply, we conclude that Sireci is not entitled to relief. Sireci was sentenced to death following a jury's recommendation for death by a vote of eleven to one. Sireci v. State, 587 So. 2d 450, 451-52 (Fla. 1991). Sireci's sentence of death became final in 1992. Sireci v. Florida, 503 U.S. 946 (1992). Thus, Hurst does not apply retroactively to Sireci's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Sireci's motion.

The Court having carefully considered all arguments raised by Sireci, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Orange County,
Wayne C. Wooten, Judge - Case No. 481976CF000532000AOX

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Julissa R. Fontán, Maria E. DeLiberato and Chelsea Shirley, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Scott A. Browne, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX

B

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

v.

CASE NO. 1976-CF-532
CAPITAL POST-CONVICTION CASE

HENRY PERRY SIRECI,

Defendant.
_____/

ORDER DENYING "SUCCESSIVE MOTION TO VACATE DEATH SENTENCE"

THIS MATTER came before the court on Defendant Henry Perry Sireci's "Successive Motion to Vacate Death Sentence" filed on January 9, 2017. Having reviewed the motion, the file, the State's Response, as well as hearing argument of counsel at a hearing on April 21, 2017, the court finds as follows:

Procedural History

In 1976, Henry Perry Sireci was convicted of the first degree murder of Howard Poteet. The trial judge followed the jury's recommendation and imposed a sentence of death. The Florida Supreme Court affirmed. *Sireci v. State*, 399 So. 2d 964 (Fla. 1981). On May 17, 1982, the U.S. Supreme Court denied certiorari. *Sireci v. Florida*, 456 U.S. 984 (1982), *rehearing denied*, 458 U.S. 1116 (1982).

Sireci subsequently unsuccessfully sought postconviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850. The denial of his motion was affirmed on appeal. *Sireci v. State*, 469 So. 2d 119 (Fla. 1985), cert. denied, 478 U.S. 1010 (1986).

On September 19, 1986, the Governor signed a death warrant for Sireci, prompting the filing of a second motion for postconviction relief. A limited evidentiary hearing on this postconviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. *State v. Sireci*, 502 So. 2d 1221 (Fla. 1987).

The trial court held an evidentiary hearing on Sireci's second 3.850 motion and ultimately ordered a new sentencing hearing on grounds that two court-appointed psychiatrists conducted incompetent evaluations at the time of the original trial. At the conclusion of the evidentiary hearing, a new penalty phase was granted. The State appealed and trial court's decision was affirmed on appeal. *State v. Sireci*, 536 So. 2d 231 (Fla. 1988). At resentencing, the jury recommended the death penalty by a vote of eleven to one and the Judge again imposed the death penalty. Sireci filed an appeal, and the Florida Supreme Court affirmed his death sentence.

Sireci v. State, 587 So. 2d 450 (Fla. 1991). The U.S. Supreme Court subsequently denied certiorari. *Sireci v. Florida*, 503 U.S. 946 (1992).

On or about August 21, 1997, Sireci filed his Third Amended Motion for Postconviction Relief. On February 9, 1999, the court summarily denied the motion. Sireci appealed, and on September 7, 2000, the Florida Supreme Court affirmed. *Sireci v. State*, 773 So. 2d 34 (Fla. 2000).

Sireci then filed several motions for DNA testing. Ultimately, he filed a third amended motion for DNA testing, which the trial court denied on July 15, 2003. The court held that Sireci failed to meet the technical requirements of Florida Rule of Criminal Procedure 3.853 and failed to show a reasonable probability of acquittal or that he would receive a lesser sentence on retrial. On appeal, the Florida Supreme Court, the Court held that the trial court erred in finding that the technical requirements of the rule were not met, but affirmed the trial court's finding that such testing carried no "reasonable probability" of a different result. *Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005). Sireci filed a petition for writ of certiorari in the United States Supreme Court, which was denied December 12, 2005. *Sireci v. Florida*, 546 U.S. 1077 (2005).

Sireci filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, on October 3, 2002. The motion was held in abeyance pending resolution of state court case. Sireci filed an amended petition and supporting memorandum on July 24, 2006. The State filed its response on November 29, 2007. The District Court denied the Petition on March 12, 2009. Sireci's motion to alter or amend the judgment was denied on July 28, 2009. On October 15, 2009, the District Court granted a certificate of appealability on Sireci's claim that the prosecutor asked a question from which the jurors could infer Sireci had been previously sentenced to death, the denial of a motion for mistrial on that basis, and, the denial of his attempt to interview the jurors. The 11th Circuit Court of Appeals affirmed the district court's decision. *Sireci v. Attorney General*, 406 Fed. Appx. 348, 351-352 (11th Cir. 2010) (unpublished). Sireci filed a petition for writ of certiorari in the United States Supreme Court, which was denied October 3, 2011.1 *Sireci v. Bondi*, 132 S. Ct. 223 (2011).

On April 21, 2014, Sireci filed an "Amended Successive 3.851 Motion to Vacate Judgment of Conviction and Sentence" which was denied by the court on November 24, 2014. Mr. Sireci appealed and on December 16, 2015, the Florida Supreme Court affirmed the denial of the motion. *Sireci v. State*, 192 SO. 3d 42 (Fla. 2015).

In his Successive Motion to Vacate Death Sentence, Mr. Sireci assets that he is entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March, 7, 2016, and the decisions of *Hurst v. State*, 2016 WL7406506 (Fla. Dec. 22, 2016) and *Asay v. State*, 2016 WL7406538 (Fla. Dec 22, 2016). Specifically, he argues the following:

1. His death penalty violated the Sixth Amendment under *Hurst* because the judge, rather than the jury, found the requisite aggravating factors.

2. He is entitled to retroactive application of *Hurst* under the fundamental fairness doctrine.

3. He is entitled to retroactive application of *Hurst* under the traditional *Witt* test.

4. He has a federal right to retroactive application of the *Hurst* decisions.

5. The State cannot establish that the *Hurst* error in his sentencing was harmless beyond a reasonable doubt.

6. His death sentence violates the Eight Amendment under *Hurst*.

7. The court's denial of his prior postconviction claims must be reheard and determined under a Constitutional framework.

The State argues that *Hurst* is inapplicable to sentences which became final prior to the decision in *Ring v Arizona*, 536 U.S. 584 (2002) and therefore all claims are procedurally barred.

In *Hurst v. Florida*, the United States Supreme Court extended its holding in *Ring* to Florida's death penalty procedures for the first time and held that the Sixth Amendment right to a jury trial rendered those procedures unconstitutional. *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Gaskin v. State*, No. SC15-1884, 42 Fla. L. Weekly S16 (Fla. Jan. 19, 2017); *Bogle v. State*, 42 Fla. L. Weekly S166 (Fla. Feb. 9, 2017). This court finds the State's arguments are well-taken and concludes that it is bound by the Florida Supreme Court's rulings. Therefore, because Mr. Sireci's sentence became final prior to 2002, he is not entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*.

As to his request for a rehearing of claims raised in his previous motions, Mr. Sireci has presented the court with no persuasive authority to support his claim. This is particularly so when the prior claims had no relation to the issue of unanimous jury findings. Mr. Sireci's prior claims were denied on the merits and affirmed by the Florida Supreme Court. As the State argues, *Hurst* does not resurrect Mr. Sireci's previously denied claims.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Successive Motion to Vacate Death Sentence is hereby **DENIED**.

2. Defendant may file a Notice of Appeal in writing within 30 days from the date of rendition of this Order.

3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 19 day of May, 2017.

Wayne C. Wooten
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Successive Rule 3.851 motion has been provided, via e-mail/Florida Courts E-Portal Filing System, this 19 day of May, 2017 to **Scott A. Browne, Esquire**, scott.browne@myfloridalegal.com, **Kenneth Nunnelley, Esquire**, knunnelley@sao9.org, **Maria E. DeLiberato, Esquire**, deliberato@ccmr.state.fl.us **Julissa R. Fontan, Esquire**, fontan@ccmr.state.fl.us, **Chelsea Shirley, Esquire**, shirley@ccmr.state.fl.us

Sharice Hall
Judicial Assistant

APPENDIX

C

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case No.: 76-532

v.

HENRY P. SIRECI,

Defendant.

_____/

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

Defendant Henry P. Sireci, by and through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of a change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, and the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, --- So.3d --- 2016 WL 6036982 (Fla.), *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla. December 22, 2016) and *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016).

1. The judgment and sentence under attack and the name of the court that rendered the same.

Mr. Sireci challenges the judgment and death sentence for his conviction for First Degree Murder rendered by the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida on October 22, 1976. Mr. Sireci also challenges the sentence of death rendered on May 4, 1990.

Mr. Sireci seeks an order of this Court vacating his death sentences, imposed by this Court only after an advisory jury recommendation of 11-1.

2. Issues raised on appeal and disposition thereof.

Mr. Sireci was convicted of first degree murder. He was sentenced to death. On direct

appeal, the Florida Supreme Court affirmed his conviction for first-degree murder, *Sireci v. State,* 399 So.2d 964 (Fla. 1981) *cert. denied Sireci v. Florida*, 456 U.S. 984 (1982) *(Sireci* I). Sireci raised the following issues on direct appeal: (1) the State improperly introduced evidence of collateral crimes; (2) the State failed to establish premeditation; (3) the testimony by a jail house snitch was unreliable and inadmissible; (4) the State's discovery violation in failing to timely list the jail house snitch and the court's failure to allow a continuance violated Mr. Sireci's constitutional rights; (5) Mr. Sireci's Sixth Amendment right to cross examine the witnesses against him was violated when the trial court refused to allow him to cross-examine Barbara Perkins about the immunity agreement she had been given by the State; (6) Mr. Sireci's rights were violated by the fact that the State failed to give him notice of the aggravating circumstances it intended to present at trial; (8) the State failed to prove the aggravating circumstances beyond a reasonable doubt; (9) the trial court improperly doubled the aggravating circumstances of robbery and pecuniary gain; (10) The trial court failed to give weight to any of his mitigating factors; (11) and the Florida capital sentencing scheme violates *Lockett* by limiting the consideration of mitigating factors. All of his claims were denied. *Id.*

Following a successful collateral challenge to his sentence of death (as will be set out below), Mr. Sireci appealed his death sentence, raising the following issues: 1) the trial court abused its discretion in failing to allow Sireci to waive a sentencing jury; 2) the trial court erred in denying a motion for mistrial when the prosecutor intentionally violated a motion in limine by telling the jurors that Sireci had been on Death Row and by prohibiting trial counsel from interviewing the jurors as to the effect of this misconduct; use of 921.141(5)(i) Fla. Stat. violates the *Ex Post Facto* clause because Sireci's crime was committed prior to when the statutory aggravator was established; the jury's death penalty recommendation as unconstitutionally

unreliable; section 921.141, Florida Statutes (1987) is unconstitutional on its face and as applied. The court denied all of Sireci's claims. *State v. Sireci*, 587 So. 2d 450 (Fla. 1991), *cert. denied Sireci v. Florida,* 503 US 946 (1992).

3. Disposition of all previous claims raised in post-conviction proceedings and the reasons the claims raised in the present motion were not raised in the former motions.

Mr. Sireci filed an initial 3.850 Motion challenging his conviction and sentence of death. Sireci alleged the following claims: that he was denied a fair and individualized sentencing due to preclusion of introduction and/or consideration of nonstatutory mitigating evidence; that his sentence was the product of racial discrimination; that he received ineffective assistance of counsel; that his right to discovery was violated by the State; the State's failure to disclose an immunity deal with Barbara Perkins violated Sireci's Due Process rights; the trial court erred in denying a continuance; and the jury instructions rendered his sentence unconstitutional. Sireci then filed a second and/or amended 3.850 Motion where he alleged the mental health examination he received was so grossly incompetent it violated his Due Process rights. The State circuit court granted his Motion. The State appealed. The Florida Supreme Court sustained the granting of relief. *State v. Sireci,* 536 So. 2d 231 (Fla. 1988).

Sireci filed another 3.850 Motion and raised the following claims: The Florida death penalty statute is vague and overbroad; Sireci's death sentence is unconstitutional due to improper application of pecuniary gain and CCP aggravating factors; his prior conviction used to support an aggravating factor was unconstitutionally obtained; the felony murder aggravator is unconstitutional; use of the CCP aggravator violates the *ex post facto* clause; Sireci is innocent and was denied a reliable and fair adversarial testing; the failure of the court to allow Sireci to waive a jury was a violation of his constitutional rights; the State's improper introduction of non-statutory

aggravating factors violated Sireci's constitutional rights; Sireci was deprived of his right to due process because the mental health expert who evaluated him failed to conduct a professionally competent evaluation; Sireci received ineffective assistance of counsel because counsel failed to move for a change of venue; Sireci was denied a reliable sentencing because the trial judge refused to consider statutory and non-statutory mitigating evidence clearly established in the record; a cumulative analysis of the errors in Sireci's trial rendered his trial as a whole unconstitutional. *Sireci v. State*, 773 So. 2d 34 (Fla. 2000).

Mr. Sireci also filed a State Habeas where he alleged that appellate counsel was ineffective for failing to raise a challenge to the avoid arrest aggravator; that the aggravators were impermissibly based on the same facts; that Sireci was unconstitutionally shackled at his 1990 trial; the Florida death penalty statute is unconstitutional under *Apprendi* and that Sireci may be incompetent at the time of execution. *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002).

Mr. Sireci also filed a 3.853 Motion for DNA testing in which he swore that he was actually innocent and sought to test the evidence against him. The courts denied Mr. Sireci the opportunity to test the evidence against him. *Sireci v. State*, 908 So. 2d 321 (Fla. 2005).

Sireci, through the assistance of CCRC and the Innocence Project, was able to persuade the State to allow DNA testing of a limited number of items of evidence through a Consent Agreement. The DNA testing of that evidence was inconclusive. In order to obtain the Consent Agreement, the State required Sireci to waive the right to seek additional DNA testing through the courts.

In April of 2014, Mr. Sireci filed a Successive Motion to Vacate his Convictions and Sentence based on newly discovered evidence that the State presented false expert testimony at trial regarding microscopic hair comparison evidence purportedly linking Mr. Sireci to the crime

scene. This Court denied that motion on January 15, 2015. Mr. Sireci timely appealed the circuit court's denial to the Florida Supreme Court. His appeal was denied and his case became final in the Florida Supreme Court on February 15, 2016. *Sireci v. State*, 2015 WL 9257768 (unpublished)(cert denied, *Sireci v. Florida*, 137 S.Ct. 470 (2016)).

***Reason claims not raised in previous motions*:**

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies. It was intended to apply in any trial, penalty phase, retrial or resentencing conducted in Florida, even when the homicide at issue had occurred prior to March 7, 2016. The revised sentencing statute provided that when 3 or more jurors voted in favor of a life sentence, the judge could not impose a death sentence. For a death recommendation to be returned, 10 jurors must have voted in favor of a death sentence.

On October 14, 2016, the Florida Supreme Court issued its decision in *Perry v. State*, --- So. 3d---, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed. As the Florida Supreme Court explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses". *Hurst v. State*, 202 So.3d 40, 72 (Fla. 2016) (internal

citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that were present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, --- So. 3d ---, 2016WL 6036982 *8, quoting *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) ("'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.'") *See also Hurst v. State*, 202 So.3d at 62, n. 18.

On December 22, 2016, the Florida Supreme Court decided that, as a matter of state law, there are two classes of defendants who are entitled to the retroactive application of *Hurst*:

1) Those whose sentences became final after the Supreme Court issued its decision in *Ring*. Such defendants are entitled to retroactive application as a group, regardless of preservation. See *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla., Dec. 22, 2016) at **56-75. Because his direct appeal proceedings concluded before *Ring* was issued, on March 23, 1992, *Sireci v. Florida*, 112 S.Ct. 1500 (1992)(denying certiorari), Mr. Sireci is outside of this group.

2) Those who specifically preserved the *Ring* issue. *See Mosley* at *53-56 & n.13 (citing *James v. State,* 615 So. 2d 668 (Fla. 1993)). Considerations of fundamental fairness dictate the application of the requirements contained in *Hurst v. Florida* to this class of defendant. Mr. Sireci is within this class. Because Mr. Sireci "raised a *Ring* claim at his first opportunity and was then rejected at every turn ... fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to him. *Mosley* at *56.

On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, and *Mosley v. State*, Mr. Sireci files this motion to vacate and presents his claims for relief arising from the resulting new Florida law, which was previously unavailable when Mr. Sireci filed his prior motions.

4. The nature of the relief sought.

Mr. Sireci seeks to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence.

5. Claims for which an evidentiary hearing is sought.

CLAIM I

MR. SIRECI'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.

This claim is evidence by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the previously conducted evidentiary hearings on the previously presented motions to vacate are incorporated herein by specific reference.

2. This motion is filed within one year of the issuance of *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, all of which established new Florida law. Accordingly, this motion is timely.

3. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2)

and (3) as unconstitutional. Under those provisions, a defendant who has been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

A. Mr. Sireci is entitled to retroactive application of both *Hurst* decisions under the fundamental fairness doctrine.

4. The *Hurst* decisions apply retroactively to Mr. Sireci under the equitable "fundamental fairness" retroactivity doctrine, which the Court has applied in cases such as *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). In *Mosley*, the Court explained that although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which has been applied in cases like *James. See Mosley*, 2016 WL 7406506, at *19. The Court's fundamental fairness analysis in *Mosley* made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* at *18-19. Rather, the *Mosley* Court's separate fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless

of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Court's flawed pre-*Hurst* law. *Mosley*, 2016 WL 7406506, at *19.

5. Although *Mosley* was a post-*Ring* case, the Court's fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. *See id.* at *19 n. 13. In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness, as measured by this Court on a case-by-case basis.

6. In assessing fundamental fairness in the retroactivity context, the *Mosley* Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst v. Florida* and *Hurst v. State* were decided. *See id.* at *19. If Mosley had raised such a challenge, the Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida's capital sentence scheme even before they were recognized in the *Hurst* decisions. *See id.* The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State's interests in the finality of death sentences.

7. In Mr. Sireci's case the *Hurst* decisions should apply retroactively under the fundamental fairness doctrine. Without the benefit of the *Ring* or *Hurst* decisions, he raised challenges at trial and on direct appeal challenging the constitutionality of Florida's death penalty statute and the advisory nature of the jury's verdict. Additionally, he filed a state habeas petition challenging the scheme under *Apprendi*. These efforts constituted a pre-*Ring* and pre-*Hurst* effort to raise *Ring*-

like challenges, as well as a specific *Apprendi/Ring* challenge at his first opportunity, in his State Habeas Petition.

8. In this case, the interests of finality must yield to fundamental fairness. Mr. Sireci, 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 Mr. Sireci "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*, 2016 WL 7406506, at *25. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the *Hurst* decisions in this case.

B. Mr. Sireci is entitled to retroactive application of both *Hurst* decisions under the traditional *Witt* test.

9. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.[1] Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided

[1] Mr. Sireci recognizes that *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst* under a *Witt* analysis, but that case left open the possibility for retroactivity under fundamental fairness. Rehearing has been filed and *Asay* is not final. In addition, Mr. Sireci' case should be decided on an individual basis. Moreover, the United States and Florida Constitutions cannot tolerate the concept of "partial retroactivity," where similarly situated defendants are granted or denied the benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. To deny Sireci the retroactive effect of *Hurst* deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* *Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that provides for judges, not juries, to make the factual findings that are statutorily required to authorize the imposition of a death sentence.

10. The third factor under *Witt* is also met because *Hurst v. Florida* "constitutes a development of fundamental significance," i.e., it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted).[2]

[2] As applied to Mr. Sireci, the first *Stovall/Linkletter* factor – the purpose to be served by the new rule – weighs heavily in favor of retroactivity. The right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 2016 WL 7406538, at *10 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life"). The second *Stovall/Linkletter* factor – extent of reliance on the old rule – also weighs in favor of applying those decisions retroactively. This factor requires examination of the "extent to which a condemned practice infect(ed) the integrity of the truth-determining process at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Florida's unconstitutional sentencing scheme has always been unconstitutional and systemically infected the truth-determining process at penalty-phase proceedings since the statute was enacted – including Mr. Sireci's trial. Accordingly, the second factor weighs in favor of retroactivity. Finally, the third *Stovall/Linkletter* factor – effect on administration of justice – also weighs in favor of retroactivity. This factor does not weigh against retroactivity unless, "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt v. State*, 387 So. 2d 922, 929–30 (Fla. 1980). There can be no serious rationale for a prediction that categorically permitting the retroactive application of the Hurst decisions to all pre-Ring defendants will "destroy" the judiciary. Undoubtedly, retroactive application will have slightly more of an impact on the administration of justice but that is not the test. Retroactive

11. Retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations 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*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925.

12. Anything less than full retroactivity leads to disparate treatment among Florida capital defendants. See *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (new penalty phases on 1974 murders); *State v. Dougan*, 202 So.3d 363 (Fla. 2016)(granting a new trial in a 1974 homicide); *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)(granting a new trial in a 1985 homicide); *Cardona v. State*, 185 So.3d 514 (Fla. 2016)(granting a new trial in a 1990 homicide), and *Johnson v. State*, ---So.3d --- 2016 WL 7013856 (Fla. December 1, 2016)(on a direct appeal from a resentencing, the Court remand for a new penalty phase because of *Hurst* error in a 1981 triple homicide).

13. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

C. Mr. Sireci has a federal right to retroactive application of the *Hurst* decisions.

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application of new rules affecting much larger populations have been approved. *See e.g. Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

14. Sireci is also entitled to the retroactive effect of *Hurst* 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 their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").

15. In *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. *First*, the Florida Supreme 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*, the Florida Supreme Court held that the Eighth Amendment required that a jury unanimously determine that the evidence presented at the penalty phase warrants a death sentence.

16. *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.[3] See *Montgomery v.*

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[3]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. The rationale of *Summerlin* was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama*—a case where the certiorari petition had not made a *Hurst* or *Ring* argument—the Supreme Court granted a *Hurst*-based petition for rehearing, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. *See* No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016). The Supreme Court then followed this approach in three additional cases. *See Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016); *Kirksey v. Alabama*, No. 15-7923, 2016 WL 378578 (U.S. June 6, 2016); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016).

Louisiana, 136 S.Ct. at 734 (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).

17. Because the Sixth Amendment rules announced in *Hurst v. State* are substantive, Mr. Sireci is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

D. The State cannot establish that the *Hurst* error in Mr. Sireci's sentencing was harmless beyond a reasonable doubt.

18. The procedure employed when Mr. Sireci 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 at 57-58. 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*, 2016 WL 6036982 at *8. In Mr. Sireci's penalty phase, one juror voted for life.

19. The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Sireci's case. In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." 202 So.3d at 68. "[T]he harmless error test is to be

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Last month, in *Powell v. Delaware*, the Delaware Supreme Court held that its recent decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), which invalidated Delaware's death penalty scheme under *Hurst*, applied retroactively under that state's retroactivity doctrine. *See* --- A.3d ----, 2016 WL 7243546 (Del. Dec. 15, 2016). As the *Powell* Court noted, *Schriro* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof." 2016 WL 7243546, at *3.

rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (internal citations and quotation marks omitted). 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 Mr. Sireci by voting for a life sentence. The State cannot meet this burden in Mr. Sireci's case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

20. As the Florida Supreme Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make.

21. When considering harmless error, this Court must look at the totality of the evidence, both at trial and in post-conviction. Significant mitigation was presented in Mr. Sireci's resentencing, but there was also additional mitigation that was not presented to Mr. Sireci's jury, and he still

received a non-unanimous recommendation.

22. The error in Mr. Sireci's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt where four jurors voted for life, hearing only limited mitigation. *See Johnson v. State*, ---So.3d---, 2016WL 7013856 (Fla. December 1, 2016)(*Hurst* error not harmless in a case with 11-1 votes for each of the three murder convictions); *Simmons v. State*, --- So.3d ---, 2016 WL 7406514(Fla. December 22, 2016)(*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); and *Franklin v. State*, --- So.3d ---, 2016 WL 6901498 (Fla. November 23, 2016)(*Hurst* error not harmless in the murder of a prison guard where the defendant had previously been serving a life sentence and the jury vote was 9-3).

23. Mr. Sireci's death sentence must be vacated and a resentencing ordered.

CLAIM II
MR. SIRECI'S DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED.

This claim is evidenced by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motion to vacate, and all evidence presented by him during the previously conducted evidentiary hearing on the previously presented motion to vacate is incorporated herein by specific reference.

2. 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*, 202 So.3d at 61. Quoting the United States Supreme Court, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the

legislation enacted by the country's legislatures.'" *Id.* Then from a review of the capital sentencing laws throughout the United States, the Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63.

3. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)[4]. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."

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[4] "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted).

Burch v. Louisiana, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

4. Mr. Sireci is within the protected class. At his both of sentencings, the jury recommended death by 11-1. Under the Eighth Amendment and the Florida Constitution his execution would thus constitute cruel and unusual punishment and would be manifestly unjust. His death sentence must accordingly be vacated, and a life sentences impose. At the very least, he is due a new penalty phase.

5. Under *Witt v. State* and the fundamental fairness doctrine, the Florida Supreme Court's decision 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.[5]

6. Moreover, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), even 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

[5] "[R]etroactivity is binary – either something is retroactive, has effect on the past, or it is not." *Asay*, 2016 WL 7406538, at *27 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery*, the Delaware Supreme Court's recent decision in *Powell v. Delaware*, 2016 WL 7243546 (Del. Dec. 15, 2016)(holding *Hurst* retroactive to all prisoners), and the Florida Supreme Court's decision in *Falcon*. If "partial retroactivity" ultimately occurs, Florida will again be the outlier, subjecting its citizens to disparate treatment under the law, in violation of the state and federal constitutions.

the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

7. In *Caldwell*, the prosecutor's argument improperly diminished the jury's sense of responsibility. As such, the Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated.[6] *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."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire makes the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.[7]

8. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death

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[6] In her concurrence, Justice O'Connor wrote: "In telling the jurors, 'your decision is not the final decision...[y]our job is reviewable,' the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." *Caldwell*, 472 U.S. at 342-43.

[7] This would certainly apply to the circumstances in Mr. Sireci's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

sentence cannot stand. *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.").

9. The United States Supreme Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

10. This Court cannot rely on the jury's death recommendation in Mr. Sireci's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

11. 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 (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based

upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) 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.").

12. Mr. Sireci'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 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*. Mr. Sireci's jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed." 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. *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."). Mr. Sireci's death sentences 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.

13. In Mr. Sireci'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 a single juror already had voted for life, even absent hearing the additional mitigation that was presented in post-conviction.

14. Finally, Mr. Sireci's death sentence should be vacated because it was obtained in violation of the Florida Constitution. The increase in penalty imposed on Mr. Sireci 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." There was no "unanimity in the final jury recommendation for death." This was a further violation of Florida Constitution.

15. Mr. Sireci 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 Mr. Sireci's death sentences based on the Florida Constitution. *See* Article I, Section 15(a) and Article I, Section 16(a).

16. 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. Sireci 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. Sireci. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a

capital prosecution. Mr. Sireci was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Sireci 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. Sireci's death sentence.

CLAIM III
THIS COURT'S DENIAL OF MR. SIRECI'S PRIOR POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

This claim is evidence by the following:

1. All other factual allegations contained in this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the previously conducted evidentiary hearings on the previously presented motions to vacate are incorporated herein by specific reference.

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

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

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

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

3. This is new Florida law that did not exist when Mr. Sireci previously presented his original 3.850 *Strickland,* his 3.853 DNA Motion, and his newly discovered evidence claims. Accordingly, Mr. Sireci's previously presented claims must be reevaluated in light of the new Florida law. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So.3d 40, 59. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. The new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. A previous rejection of a death sentenced defendant's *Strickland* claims, *Brady* claims,

and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

5. This Court must re-visit and re-evaluate the rejection of Mr. Sireci's previously presented claims, including his newly discovered evidence claim regarding the false testimony of the crime scene analyst regarding microscopic hair comparison in light of the new Florida law which would govern at a resentencing. When such a re-evaluation is conducted, it is apparent that the outcome would probably be different and that Mr. Sireci would likely receive a binding life recommendation from the jury.

CONCLUSION

Based on the foregoing, Mr. Sireci requests: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments, the Florida Constitution, and *Hurst v. Florida, Perry v. State, Hurst v. State*, and *Mosley v. State*; 2) an opportunity for further evidentiary development to the extent necessary; and, 3) on the basis of the reasons presented herein, Rule 3.851 relief vacating his sentence of death and granting a new penalty phase, or, in the alternative, the imposition of a life sentence.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that counsel discussed the contents of this motion with Mr. Sireci. Counsel further certifies that counsel to the best of their ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been electronically filed with the Clerk of the Clerk for the Ninth Judicial Circuit in and for Orange County and electronically served upon the Honorable Wayne C. Wooten, ctjash1@ocnjcc.org; Assistant

Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, and Assistant State Attorney Kenneth Nunnelley, knunnelley@sao9.org and PCF@sao9.org on this 9th day of January, 2017.

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CRIMINAL DIV.
CIRCUIT COURT

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NUMBER CR 76-532

STATE OF FLORIDA,

Plaintiff,

-vs-

HENRY PERRY SIRECI, JR
A/K/A BUTCH BLACKSTONE
Defendant.

FILED IN OPEN COURT
THIS 22 DAY OF Oct., 1976
R. P. Kirkland, Clerk
BY Dana Buntrop D.C.

JUDGMENT ~~AND SENTENCE~~

You, HENRY PERRY SIRECI, JR., being now before the Court, attended by your attorney, EDWARD R. KIRKLAND, and you having (1) been tried and found guilty of ~~(2) pleaded guilty to (3) pleaded nolo contendere to~~ FIRST DEGREE MURDER

the Court Adjudges that you are guilty of said offense, ~~and it is the Sentence of the Law and the Judgment of the Court that you~~ _____, ~~be committed to the custody of the (1) Florida Division of Corrections (2) Orange County Correctional Facility (3) Orange County Jail, to be imprisoned at Hard Labor for a term of~~ _____

_____

_____

and you are further Ordered to pay a fine and cost in the amount of $ 2.00.

DONE and ADJUDGED in open Court at ORLANDO, Orange County, Florida this the 22 day of OCTOBER, 19 76, pursuant to Rules 3.670 and 3.700 RCrP.

Maurice M Paul
Judge

10-22-76 Henry Perry

(Fingerprints, if required by Sec. 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY LEFT HAND	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY RIGHT HAND
			

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, HENRY PERRY SIRECI, JR., and that they were placed thereon by said defendant in my presence, in open court, this the 22 day of OCTOBER, 19 76, pursuant to Sec. 30.31.

RECORDED & RECORD VERIFIED
County Comptroller, Orange Co., Fla.

202

Maurice M Paul
Judge

32-11 (3/73)

✓ COURT MINUTES ✓ ORDER (PLEA/SENTENCING/RELEASE)

IN THE CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
VS
Henry Perry Sireci, f/k/a Butch Blackstone

CASE CR 76-532
DIVISION 14

CHARGED WITH: 1° Murder

COURT OPENED AT 11:15 AM on 5/4/90 HONORABLE G.A. Tomet JUDGE

ASSISTANT PUBLIC DEFENDER _____ ASSISTANT STATE ATTORNEY C. Berner

COURT REPORTER D. Tompkins RE COURT DEPUTY A. Petrucelli

This case came on this date for ___Plea ✓Sentencing ___Trial ___Pre-Trial.

The Defendant was ___present, ___not present, ✓present with Counsel D. West

___Plea of not guilty withdrawn. ___Defendant tried and found guilty of: ___Defendant sworn and pled ___Guilty to:

___Nolo Contendere to: _____

___Defendant reserves right to appeal ___Adjudication of Guilt withheld, finding of guilt entered.

___Defendant adjudged guilty. ___$5.00 C.C. ___$20.00 C.C.F. ___$200.00 C.J.T.F. or ___$50.00 C.J.T.F.(27.3455)

___**P.S.I. ORDERED.** It is hereby Ordered that the Department of Corrections submit P.S.I. or a scoresheet of Defendant and deliver a written report of same to the undersigned Judge within two working days before sentencing. STATUS _____.

___Sentencing set for _____, 19____, at _____.M., Courtroom _____

___P.S.I. Bond set at _____. ___P.D.R. ORDERED. ___P.S.I. waived.

SENTENCING:

___Adjudication of guilt was withheld, a finding of guilt entered.

___Defendant adjudged guilty. ___$5.00 C.C. ___$20.00 C.C.F. ___$200.00 C.J.T.F. (27.3455)or ___$50.00 C.J.T.F.

SENTENCE: Prem. Adj G - Defendant remanded to custody to await the imposition of the death penalty.

___RELEASE - Defendant is Ordered released from custody as to this case only.

DONE AND ORDERED this 4 day of May, 1990.

Harry P. Brent Jr.
CIRCUIT JUDGE

FILED IN OPEN COURT THIS 4 DAY OF May, 1990. Distribution: ___Surety/Cash Bond
FRAN CARLTON, Clerk of the CIRCUIT/COUNTY Courts. ~~___Defendant~~
by: _____ ~~___Correction/Parole~~
DEPUTY CLERK in attendance. ~~___Court Deputy~~
___S.O. on _____

COURT RECESSED at AM on 5/4/90.

32-60(B) (9/89)

FILED IN OPEN COURT
THIS 4 DAY OF May, 1990
Fran Carlton, Clerk
BY [signature] D.C.

Re-SENTENCE

Defendant Henry Perry Sireci, a/k/a Butch Blackstone 2
Case Number CR 86-532

(As to Count One)

The Defendant, being personally before this Court, accompanied by his attorney, D. West, and having been adjudged guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision if applicable)

- ☐ and the Court having on _____ (date) deferred imposition of sentence until this date.
- ☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that:

- ☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.
- ☑ The Defendant is hereby committed to the DEPARTMENT OF CORRECTIONS. *
- ☐ The Defendant is hereby committed to the custody of the Sheriff of ORANGE COUNTY, Florida.

To be imprisoned (check one; unmarked sections are inapplicable)

- ☐ For a term of Natural Life.
- ☐ For a term of _____
- ☐ For an indeterminate period of 6 months to _____ years.

If split sentence complete either of these two paragraphs

- ☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

* to await the imposition of the Death Penalty.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm - 3 year mandatory minimum
☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking - mandatory minimum
☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction
☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for a period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender
☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S.775.084(4)(a). The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Jail Credit
☐ It is further ordered that the Defendant shall be allowed a total of _____ credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional).

Consecutive/ Concurrent
It is further ordered that the sentence imposed for this count shall run ☐ Consecutive to ☐ Concurrent with (check one) the sentence set forth in count _____ above.

Defendant Succi, R.

Case No CR 76-532

Consecutive/Concurrent
(As to other convictions)

It is further ordered that the composite term of sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

☐ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Orange County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Orlando, Orange County, Florida,
this 4th day of May A.D., 19 90.

Gary L. Formet Sr.
JUDGE

32-12 (9/89)

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: CR76-532

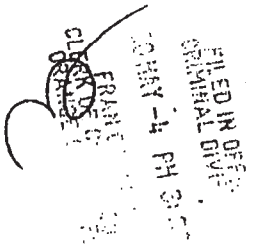
STATE OF FLORIDA,

Plaintiff,

vs.

HENRY SIRECI,

Defendant.



SENTENCING ORDER

Defendant, Henry Perry Sireci, was convicted and sentenced to death for the first degree murder of Howard Poteet. His conviction and sentence was affirmed by the Supreme Court of Florida. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Sireci filed a motion for post conviction relief under Florida Rule of Criminal Procedure 3.850, alleging he had received ineffective assistance of two court appointed psychiatrists. After an evidentiary hearing this Court partially granted the relief sought and ordered that a new sentencing hearing be conducted.

A new penalty phase sentencing hearing was held beginning April 9, 1990. A new jury was impaneled and on April 20, 1990 they rendered an advisory verdict recommending by a vote of 11 to

1 the imposition of the death penalty.

This Court in arriving at this decision has considered only the evidence presented in this last sentencing hearing therefore this decision is based upon the same evidence considered by the jury and not upon any other evidence presented in the original trial.

The Court finds the following aggravating circumstances proven beyond a reasonable doubt:

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence.

It is undisputed the Defendant was convicted of the robbery of Eddie Nelson in 1970 and the first degree murder of John Short which occurred three days before the murder of Howard Poteet.

2. The murder was committed during a robbery and for pecuniary gain.

The Defendant had murdered John Short while robbing a store three days before this murder and told Barbara Perkins he did it because she needed money. He gave part of the money to her. The

day after the Short murder he told her he planed to steal a car to commit another robbery.

On the day of the Poteet murder he called Howard Poteet and asked him to remain open until he could meet him. The Defendant was a skilled automobile mechanic. Had he only intended to steal a car it would have been unnecessary to have the victim present. He specifically obtained a tire iron prior to the robbery and subsequent to the murder admitted to several persons he had struck the victim with it. Had his plan been to surreptitiously take a key and to return later to steal a car the tire iron would have been unnecessary. It is clear he was prepared for violence.

It is undisputed that he took the victim's wallet containing money and credit cards.

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest by eliminating a witness.

During the robbery of Eddie Nelson in 1970 the Defendant told Nelson he was going to have to kill him to keep him from identifying him. It is not clear if this was just a threat to scare the victim or if he was prevented from carrying out his threat by the arrival of another customer but it is clear that his

subsequent arrest and conviction of the robbery was the result of the victims identifying him to the police.

After the robbery of John Short he told Barbara Perkins he killed Short to keep him from identifying him and wished he knew the identity of a customer who saw him so he could kill him to keep him from being a witness.

Subsequent to the murder of Howard Poteet the Defendant told David Wilson, Detective Arbisi and Harvey Woodall that Poteet was killed to keep him from being a witness. The defense contention that the statements suggest confabulation is not convincing based upon the evidence.

4. The murder was especially heinous, atrocious and cruel.

The victim received 55 knife wounds many of which were deep enough to penetrate internal organs. Some were defensive wounds and his neck was slit. It is apparent from the physical evidence the victim struggled with the Defendant and was conscious while many of the wounds were inflicted.

The Defense claims the multiple stab wounds suggest an uncontrolled frenzy, a product of the defendant's mental condition

and brain damage. Defense experts testified that such a frenzy could result once the defendant began stabbing the victim. There is no evidence that the Defendants mental condition and brain damage would prohibit him from recognizing the suffering this would cause.

Three days before the Poteet murder the Defendant murdered John Short by stabbing him multiple times and cutting his neck. Armed with this recent experience and knowledge of Short's suffering he undertook this murder in the exact manner, a manner designed to inflict a high degree of pain with indifference to the suffering of his victim.

5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Defendant murdered John Short during a robbery and afterward told Barbara Perkins he had done so to eliminate a witness. In preparation of the robbery of Poteet Motors he called to insure the victim would remain at the business until he could arrive. He specifically obtained a tire iron which, after having assured the victim's presence, he could only have planned to use as a weapon of violence. The evidence establishes that the murder of Howard

Poteet was intended from the very beginning of the robbery plot.

The defense has presented creditable expert and lay testimony in mitigation. The evidence convincingly establishes the Defendant suffers from organic brain damage. That he was physically, sexually and emotionally abused as a child by his mother and physically and emotionally abused by his father. That he was raised in a dysfunctional family and neglected and rejected as a child by his parents and his peers. As a student his educational need were not met by the schools he attended or his parents. His emotional age is lower than his chronological age and he may be described as functionally retarded.

The testimony of Dr. Dorothy Lewis and Dr. Jonathan Pincus regarding their findings of common factors of extremely violent and aggressive persons, namely: insult to the brain or central nervous system, tendency to misinterpret reality and a history of abuse was very convincing. It is clear the Defendant suffers from brain damage and has a horrible history of abuse.

Dr. Lewis testified that the Defendant was one of the most impaired violent persons she had encountered. It was her opinion that at the time of the murder the Defendant was under the influence of an extreme emotional disturbance that severely

impaired his ability to appreciate the criminality of his actions.

Dr. Pincus testified the Defendant's brain damage was equivalent to a frontal lobotomy and would impair his judgment, increase impulsiveness and impair his ability to act within the law.

Based upon the mitigating evidence presented the defense claims four statutory mitigating circumstances exist.

1. Extreme Mental or emotional disturbance.

Based upon the testimony of Drs. Lewis and Pincus it is clear the Defendant has a high potential for aggression and violence. This may be a basis for the medical conclusion he was under an extreme mental or emotional disturbance and may tend to decrease the weight given to the aggravating circumstance of heinous, atrocious or cruel but the evidence does not establish a legal basis for the statutory mitigating circumstance.

2. Extreme duress or substantial domination.

The evidence showed the Defendant was vulnerable to suggestions and the robbery was probably committed to get money

for Barbara Perkins but falls short of showing the murders were committed while under extreme duress or the substantial domination of another person. The Defendant was exercising his free will and knowingly committed this murder.

3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The Defendant understood the criminality of his conduct. He acted to eliminate witnesses to his robberies and avoided the location of one of the robberies after its commission to avoid detection. He prepared in advance for the death of Howard Poteet.

4. The Defendant's age.

The evidence of the Defendant's low emotional age is insufficient to establish this statutory mitigating circumstance.

While the Court does not find any statutory mitigating circumstances there are significant non statutory mitigating circumstances which must be weighed. In spite of his bleak childhood the Defendant was a hard and steady worker. He manifested a concern for others and was unselfish with his friends

and family. He has done well in prison. He has brain damage and has suffered severe abuse as a child.

The Defendant's brain damage and history of abuse resulting in his having at least two factors common in aggressive violent persons does not establish an uncontrolled propensity for violence nor can it be found to be the cause of the heinous nature of the offense but does cause this court to give lesser weight to that aggravating circumstance.

My heart goes out to Henry Sereci. He has suffered far more from life than most people can comprehend but his suffering does not excuse the murder and suffering of Howard Poteet.

This court finds sufficient aggravating circumstances proven to the exclusion of every reasonable doubt to justify the imposition of a sentence of death. The aggravating circumstances significantly outweigh the mitigating circumstances. The imposition of a sentence of death is required.

Done and Ordered this 4th day of May, 1990.

Gary L. Formet, Sr.
Circuit Judge

copies: Chris A. Lerner, Assistant State Attorney

Donald R. West, Esquire
626 West Yale Street
Orlando, FL 32804

APPENDIX

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Filing # 62867730 E-Filed 10/16/2017 12:41:45 PM

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-1143

HENRY P. SIRECI

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

RESPONSE TO ORDER TO SHOW CAUSE

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744

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INTRODUCTION

For over 40 years, Mr. Sireci has maintained his innocence for his 1976 felony murder conviction and subsequent death sentence after a resentencing in 1990. The death sentence on Mr. Sireci was imposed after a non-unanimous jury recommendation 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). But for the date of his crime, Mr. Sireci would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings.

The issue left at least partially unresolved in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Mr. Sireci *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 numerous collateral-review cases where the defendant's sentence became final after *Ring*. Mr. Sireci asserts that this Court's *Mosley*[1]-*Asay*[2] dividing line violates the Fourteenth Amendment's requirement of equal protection of the

[1] 209 So. 3d 1248 (Fla. 2016)
[2] 210 So.3d 1 (Fla. 2016)

laws and the prohibition of capricious capital punishment embodied in the Eighth and Fourteenth Amendments. Neither the federal nor the state rights to jury findings as the necessary predicate for a death sentence should be split in this extraordinary manner.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal addresses whether state and/or federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than limiting *Hurst* relief to only post-*Ring* death sentences. Mr. Sireci respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Sireci also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.[3]

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[3] The Florida Constitution references the right to appeal and habeas corpus in a number of provisions.

Under the Florida Constitution, Article I, Section 13, provides,

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Under the Florida Constitution, Article I Section 21, provides,

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article V Section 3(b)(1), goes on to provide that this Court "Shall hear appeals from final judgments of trial courts imposing the death penalty . . .." Sub-Section 9 also provides that this Court, "May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any

Depriving Mr. Sireci 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).

RELEVANT PROCEDURAL HISTORY AND FACTS

Mr. Sireci's trial counsel extensively challenged the constitutionality of Florida's death penalty scheme prior to his 1990 resentencing. Tr. Vol. XXIV, p. 2880-2883; Vol. XXV, 2913-3011; Vol. XVI, p. 3240-41. The motions filed included, but were not limited to, a "*Caldwell* Motion to Prohibit any Reference to

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judge thereof, or any circuit judge." Moreover, in the context of an appeal as a matter of right, the United States Supreme Court held in *Anders v. State of Cal*., 386 U.S. 738,87 S. Ct. 1396 (1967) that,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.

Anders v. State of Cal., 386 U.S. 738, 744 (1967). Denying full briefing denies Mr. Sireci the opportunity have "an active advocate" plead his case. It is also an additional violation of the right to Due Process and Equal Protection under the Florida and United States Constitution, and a violation of the right to seek habeas corpus. This Court has long held that due process requires an individual determination in a case.

Advisory Role of the Jury in Sentencing" and a "Motion for Special Verdict Form," which requested that the jury be required to express their factual findings regarding mitigation and aggravation. On direct appeal, Mr. Sireci challenged the denial of these motions, and specifically argued that the jury's death penalty recommendation was unconstitutionally unreliable and that section 921.141, Florida Statutes (1987) was unconstitutional on its face and as applied. This Court denied all of Mr. Sireci's claims. *State v. Sireci*, 587 So. 2d 450 (Fla. 1991), *cert. denied Sireci v. Florida,* 503 US 946 (1992). Later, in a state habeas petition, Mr. Sireci argued that the Florida death penalty statute was unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466 (2000). *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002).

Mr. Sireci also filed a 3.853 Motion for DNA testing in which he swore that he was actually innocent and sought to test the evidence against him. The courts denied Mr. Sireci the opportunity to test the evidence against him. *Sireci v. State*, 908 So. 2d 321 (Fla. 2005).

In April of 2014, Mr. Sireci filed a Successive Motion to Vacate based on newly discovered evidence that the State presented false expert testimony at his 1976 trial regarding microscopic hair comparison evidence purportedly linking Mr. Sireci to the crime scene. The circuit court summarily denied that motion and this Court affirmed. *Sireci v. State*, 192 So.3d 42 (Fla. 2015) (unpublished)(cert denied, *Sireci v. Florida*, 137 S.Ct. 470 (2016)).

ARGUMENT

I. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Sireci.

As will be discussed further below, to deny Mr. Sireci retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Sireci'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)).

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*. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). 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 cases. *See, e.g.*, *Asay v.*

State, 210 So. 3d 1 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Mr. Sireci the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Mr. Sireci *Hurst* retroactivity because his death sentence became final in 1992, 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.

A. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

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). This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief.

While retroactivity principles always involve some level of arbitrariness and the need to draw temporal lines, this Court's post-*Hurst* retroactivity rulings have injected a degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence, such that it rises to a violation of the Eighth Amendment and Equal Protection.

Like his post-*Ring* counterparts, Mr. Sireci was sentenced to death under a procedure that allowed factual findings to be made by a judge instead of a jury. However, unlike the majority of his post-*Ring* counterparts, Sireci has demonstrated over a long period of time that he is capable of adjusting to live without endangering any valid interest of the state. Mr. Sireci "has lived in prison under threat of execution for 40 years." *Sireci v. Florida*, 137 S. Ct. 470, 196 L. Ed. 2d 484 (2016)(Justice Breyer, dissenting from the denial of certiorari). As such, he has already been punished more severely and for longer than his post-*Ring* counterparts. "This Court, speaking of a period of *four weeks*, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected." *Id*. at 470(emphasis in original).

Finally, Mr. Sireci, more so than the majority of his post-*Ring* counterparts, was subjected to a trial and sentencing that that involved problematic and unreliable fact-finding. Since his 1976 conviction and 1990 death sentence, the advent of DNA testing and improved forensic science significantly undermines the validity of his

original conviction and sentence. As noted above, Mr. Sireci has repeatedly been denied DNA testing by the courts. Further, just within the last few years it has been established that flawed microscopic hair analysis, the lynchpin of the State's case against Mr. Sireci, is inherently unreliable. In fact, the hair evidence linking Mr. Sireci to the crime scene has never been subjected to DNA testing.

Taken together, these considerations make it plain that this Court's *Mosley-Asay* dividing line involves a level of arbitrariness that is not constitutionally tolerable. For example, the arbitrary results of this Court's 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;[4] 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;[5] 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 certiorari in the United

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[4] *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*).
[5] *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*.

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

In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.[6]

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[6] Adding to the "fatal or fortuitous accidents of timing" as described by Justice Lewis, Mr. Card's Petition for Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, for reasons unknown, Mr. Card's Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm with *Bowles v. Florida*, Case No. 01-9716, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited October 3, 2017).

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 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."). As noted above, Mr. Sireci's trial and appellate counsel extensively raised and preserved *Ring*-like challenges.

B. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process.

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes are created to receive different treatment by a state actor like this Court, the question becomes "whether there is some ground of difference that rationally explains the

different treatment . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This Court's *Hurst* retroactivity cutoff lacks a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Mr. Sireci violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *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).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See id.* at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring), *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g.*, *Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

C. Sireci's death sentence also violates the Eighth Amendment.

This Court held in *Hurst v. State* that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts

before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.[7]

II. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review.

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.

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[7] Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sireci's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in Hitchcock, "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.).

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here 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." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Sireci under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Sireci by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*.

First, a Sixth Amendment rule was established requiring that a jury find as fact: (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 aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst

offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and 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." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *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"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed by on a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an

appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive.[8] This Court must address Sireci's federal retroactivity arguments.[9]

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[8]*See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] 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."); *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.").

[9] Because this Court is bound by the federal constitution, it has the obligation to address Sireci'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). This requires full briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court ignored them. To dismiss this appeal on the basis of *Hitchcock* would be to compound that error.

III. Sireci's death sentence violates *Hurst*, and the error is not "harmless."[10]

Mr. Sireci was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by the United States Supreme Court and this Court. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22.

Mr. Sireci's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Mr. Sireci to death.

This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes

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[10] Although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

a non-unanimous recommendation of death, the *Hurst* error is not harmless.").[11] Mr. Sireci's jury recommended death by a vote of 11-1.

To the extent any of the aggravators applied to Mr. Sireci were based on contemporaneous convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. This Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").

CONCLUSION

This Court should apply the *Hurst* decisions retroactively to Mr. Sireci, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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[11] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (8-4 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote)

CERTIFICATE OF SERVICE

We 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 Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 16th day of October, 2017.

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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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APPENDIX

E

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IN THE SUPREME COURT OF FLORIDA

HENRY P. SIRECI
Appellant,

v.

SC17-1143

STATE OF FLORIDA
Appellee.

RESPONSE TO STATE'S REPLY TO ORDER TO SHOW CAUSE

The State asserts that Mr. Sireci is not entitled to any *Hurst*[1] relief under this Court's current precedent because his sentence became final before *Ring v. Arizona*[2]. This *Ring*-based cutoff is unconstitutional and should not be applied to Sireci. Denying Sireci *Hurst* relief because his sentence became final in 1998, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Additionally, the State makes a number of unnecessary and personal attacks on Mr. Sireci's longstanding claim of innocence, calling it "irrelevant but also disingenuous" and "belated and completely unsupported." (Response, p. 4-5). The State ignores the fact that it alone has the power to put the innocence issue to rest by

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

agreeing to DNA testing of the hair that was unequivocally used to convict Mr. Sireci of this crime. Instead, the State has taken every opportunity to oppose DNA testing of the hair, and yet maligns Sireci for continuing to assert his innocence as he has done for the past 40 years.

1. This Court should allow full briefing and oral argument.

As Mr. Sireci asserted in his initial response, depriving him of full briefing 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); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In fact, it appears that this Court's truncated procedure in cases in Mr. Sireci's posture is being held against capital defendants who have complied with this Court's limitation on the scope and substance of the Responses on the Orders to Show Cause. *See Hannon v. State*, --So. 3d. ---, 2017 WL 4944899, *13 (November 1, 2017)(Faulting Hannon for purportedly failing to raise a *Caldwell* claim, though he, like Sireci, was similarly limited in scope and substance. "The dissent asserts that Hannon raises a *Caldwell* claim in this Court. It is true that Hannon challenged his sentences under *Caldwell* in the circuit court, however, he did not raise that claim here.").

Mr. Sireci respectfully renews his requests for the opportunity to file a full, untruncated brief in this mandatory-jurisdiction appeal pursuant to the standard Florida Rules of Appellate Procedure, and for the opportunity to present oral argument pursuant to Rule 9.320. He does not waive or abandon any of his claims.

2. The State is incorrect in asserting that *Hitchcock* addressed the federal retroactivity arguments Mr. Sireci raised in this proceeding.

The State is incorrect that Mr. Sireci "makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in Hitchcock, and more recently in the death warrant litigation of Asay…and Lambrix." (Response, p. 7)(citations omitted). This Court's decision in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), did not explicitly address or reject *any* of the federal retroactivity arguments that Mr. Sireci raised in response to this Court's Order to Show Cause.

This Court's opinion in *Hitchcock* relied exclusively on the reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). As the State acknowledges, *Asay* rested entirely on the *state* retroactivity law articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* State's Resp. at 6 ("In Asay . . . . [t]his Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So.2d 922 (Fla. 1980)."). The exclusive reliance on state law is evident from *Asay* itself. *See* 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is already final at

the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.").[3]

Asay did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Mr. Sireci's Response to the Order to Show Cause in this proceeding. Namely, *Asay* did not address whether a retroactivity "cutoff" drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Hitchcock*, in relying totally on *Asay*, also did not explicitly address or reject Mr. Sireci's federal retroactivity arguments. *See Hitchcock*, 2017 WL 3431500, at *1 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* at *2 ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.").

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[3] As this Court has repeatedly emphasized, *Witt* addressed retroactivity as a matter of state law, which is separate and distinct from federal retroactivity analysis. *See, e.g.*, *Falcon v. State*, 162 So. 3d 954, 955-56 (Fla. 2015).

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those matters in its exclusively-state-law analysis, and imploring the courts to explicitly address federal law. Those defendants, appellants, and petitioners, as Sireci has here, advanced federal retroactivity arguments under the Eighth and Fourteenth Amendments, as well as the Supremacy Clause and *Montgomery*. If this Court had intended to put those federal arguments to rest in *Hitchcock*, it could have done so. But any fair reading of *Hitchcock* leads to the conclusion that those issues remain unresolved in light of the Court's wholesale reliance on *Asay*. Indeed, *Hitchcock* does not even mention the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery*, or otherwise explain why the Supremacy Clause does not require the substantive rules announced in the *Hurst* decisions to be retroactively applied by state courts. The State's response to the order to show cause here does not contend otherwise.

To the extent the State suggests that Mr. Sireci's federal arguments have been addressed in other cases, those decisions are not applicable here. The Eleventh Circuit's decision in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), is not precedential in this Court and was decided in the context of the

current federal habeas statute, which dramatically restricts federal review of state-court decisions. This Court's application of federal constitutional protections, on the other hand, is not circumscribed.

More importantly, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations also render inapplicable to Appellant this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017).

3. The State's cursory arguments in opposition that *Hurst* should not be applied retroactively to Sireci under federal law are not persuasive.

The State asserts that *Hurst* is not retroactive under federal law and states that Mr. Sireci's reliance on *Montgomery* is misplaced. (Response, p. 10). However, the State fails to address Mr. Sireci's argument that in *Montgomery*, the United States Supreme Court held that because *Miller v. Alabama*, 567 U.S. 460 (2012), "determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a

significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him." 136 S. Ct. at 734 (internal citations omitted).

Additionally, "*Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Id*.

Likewise, *Hurst* determined that a defendant sentenced to death without a jury unanimously finding all statutorily necessary facts is an unconstitutional penalty. Like *Miller*, *Hurst* did not bar capital punishment for all defendants, but it did bar the sentence for all but the rarest of defendants. *Hurst* drew a line between those

defendants whose murders do not rise to the most aggravated and least mitigated, and those whose capital offenses do. And, "the fact that the [death penalty] could still be a proportionate sentence for the latter kind of offender does not mean that all other [capital defendants] imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Montgomery*, 136 S. Ct. at 734.

Lastly, and importantly for purposes of *Hurst* retroactivity analysis, the United States Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. One cannot conflate "a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Id.* at 734-35. Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *Id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

4. Mr. Sireci's non-unanimous death sentence violates the Eighth Amendment.

The State fails to adequately address Mr. Sireci's claim that his nonunanimous jury recommendation violates the Eighth Amendment. This Court held in *Hurst v.*

State that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.

Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sireci's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in Hitchcock, "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.).

5. The State abandons any harmless error arguments.

The State abandons any argument that the *Hurst* error in Mr. Sireci's case was harmless by failing to even reference harmless error in its Response. *See Hoskins*, 75 So. 3d at 257 ("An issue not raised in an initial brief is deemed abandoned")(citing *Hall*, 823 So.2d at 763 (Fla. 2002)). As Mr. Sireci argued in his initial filing, the *Hurst* error is not harmless under this Court's precedent in light of the advisory jury's non-unanimous recommendation. *Dubose v. State*, 210 So.3d 641, 657 (Fla. 2017)("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").

CONCLUSION

This Court should hold that state and federal law requires the *Hurst* decisions to be applied retroactively to Sireci, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

We 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 Scott Browne,

scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 6th day of November, 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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APPENDIX

F

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR76-532

DIVISION 14

FILED IN OPEN COURT
THIS 20 DAY OF April, 19 90
Fran Carlton, Clerk
BY _____ D.C.

STATE OF FLORIDA,

Plaintiff,

vs.

Henry Perry Sireci, Jr.

Defendant.
_____/

This is to certify these were the Jury Instructions given on the above case.

GARY L. FORMET, SR.
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: CR76-532

STATE OF FLORIDA,

Plaintiff,

vs.

HENRY SIRECI,

Defendant.

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and, if they do, whether they are sufficient to outweigh any mitigating circumstances you are reasonably convinced exist.

Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;

   a. The crime of first degree murder is a capital felony

2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

ROBBERY
F.S. 812.13

Before you can find the defendant was engaged in the commission of Robbery, the State must prove the following four elements beyond a reasonable doubt:

A. Henry Sireci took money or property from the person or custody of Howard Poteet.

B. Force, violence or assault, or putting in fear was used in the course of the taking.

C. The property taken was of some value.

D. The taking was with the intent to permanently deprive Howard Poteet of his right to the property or any benefit from it or to appropriate the property to his own use or to the use of any person not entitled to it.

"In the course of the taking" means that the act occurred prior to, contemporaneous with, or subsequent to the taking of the property and that the act and the taking of the property constitute continuous series of acts or events.

In order for a taking of property to be robbery, it is not necessary that the person robbed be the actual owner of the property. It is sufficient if the victim has the custody of the property at the time of the offense.

The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim, or by putting the victim in fear so that he does not resist. The law does not require that the victim of robbery resist to any particular extent or that he offer any actual physical resistance if the circumstances are such that he is placed in fear of death or great bodily harm if he does resist. But unless prevented by fear there must be some resistance to make the taking one done by force or violence.

In order for a taking by force, violence or putting in fear to be robbery, it is not necessary that the taking be from the person of the victim. It is sufficient if the property taken is under the actual control of the victim so that it cannot be taken without the use of force, violence or intimidation directed against the victim.

3. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

This purpose cannot be found by you unless strong proof clearly shows that the dominant or only motive for the murder was the elimination of the eyewitness. This proof cannot be inferred solely from the fact that the victim could have identified his assailant.

4. The crime for which the defendant is to be sentenced was committed for financial gain;

5. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel;

Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those first degree murders where the actual commission of the homicide was accomplished by such additional acts as to set the crime apart from the norm of first degree murders - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

If the victim in this case lost consciousness, any event which occurred after unconsciousness began cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. Any event after the death of the victim cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. If you have reason to doubt whether some particular event occurred after unconsciousness or death, you cannot consider that event in deciding whether the State has established this aggravating circumstance.

6. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

A cold, calculated, and premeditated crime is one in which the Defendant thought out, designed, prepared, or adapted by forethought or careful plan the murder he committed.

Two aggravating circumstances may not refer to the same aspect of the offense. If you find that two aggravating circumstances are proven beyond a reasonable doubt, but that they refer to the same aspect of the offense, then you should consider them as only one aggravating circumstance.

For example, if you find the offense was committed for pecuniary gain and was committed during a robbery you must consider them as only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:

1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance;

2. The Defendant acted under extreme duress or under the substantial domination of another person;

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

4. Any other circumstance of the offense and any other aspect of the defendant's record, character or background including whether the Defendant suffered from mental illness, low emotional age, functional retardation, brain damage, neglect or had been emotionally, physically or sexually abused.

You should give no lesser weight to mitigation you find because it is not specifically identified in these instructions.

It is your solemn responsibility to determine if the State has established one or more aggravating circumstances beyond a reasonable doubt against Henry Sireci. Your verdict must be based solely on the evidence, or lack of evidence, and the law.

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt, Such a doubt must not influence you ~~not~~ to find that an aggravating circumstance has not been established if you have an abiding conviction that an aggravating circumstance is established. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction that an aggravating circumstance has been established, or, if having a conviction that an aggravating circumstance has been established, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance is not proved beyond every reasonable doubt and you must find that the aggravating circumstance has not been established because the doubt is reasonable.

It is to the evidence introduced upon this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to establishment of an aggravating circumstance may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt as to the establishment of an aggravating circumstance, you should find that aggravating circumstance not present. If you have no reasonable doubt as to the establishment of an aggravating circumstance, you should find it established.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you should consider it as established.

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

8. Was it proved that the witness had been convicted of a crime?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses, with one exception - the law permits an expert witness to give his opinion.

However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.

Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

2.05 RULES FOR DELIBERATION

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. This case must be decided only upon the evidence that you have heard from the answers of the witness and have seen in the form of the exhibits in evidence and these instructions.

3. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

4. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his testimony.

2.07 CAUTIONARY INSTRUCTION

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established. SHOULD.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Henry Sireci should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of _____, advise and recommend to the court that it impose the death penalty upon Henry Sireci.

On the other hand, if by six or more votes the jury determines that Henry Sireci should not be sentenced to death, your advisory sentence will be:

> The jury advised and recommends to the court that it impose a sentence of life imprisonment upon Henry Sireci without possibility of parole for 25 years.

In just a few moments you will be taken to the jury room by the court deputy. The first thing you should do is elect a foreman. The foreman presides over your deliberations, like a chairman of a meeting. It is the foreman's job to sign and date the verdict form when all of you have agreed on a verdict in this case. The foreman will bring the verdict back to the courtroom when you return. Either a man or a woman may be foreman of a jury.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the court.

APPENDIX

G

7.11 FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

This instruction should be given after the closing arguments in the penalty phase of a death penalty trial. The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

In making your decision, you must first unanimously determine whether the aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

Aggravating factors. § 921.141(6), Fla. Stat.
The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

1. (Defendant) **was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

2. (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

Give 2a or 2b as applicable.

a. The crime of (previous crime) **is a capital felony.**

b. The crime of (previous crime) **is a felony involving the [use] [threat] of violence to another person.**

3. (Defendant) **knowingly created a great risk of death to many persons.**

4. The First Degree Murder was committed while (defendant) **was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].
[sexual battery].
[aggravated child abuse].
[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
[arson].
[burglary].

[kidnapping].
[aircraft piracy].
[unlawful throwing, placing or discharging of a destructive device or bomb].

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The First Degree Murder was committed for financial gain.

7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The First Degree Murder was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold,

calculated, or premeditated nature of the murder.

10. (Decedent) **was a law enforcement officer engaged in the performance of [his] [her] official duties.**

11. (Decedent) **was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to** (decedent's) **official capacity.**

12. (Decedent) **was a person less than 12 years of age.**

13. (Decedent) **was particularly vulnerable due to advanced age or disability, or because** (defendant) **stood in a position of familial or custodial authority over** (decedent).

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],
[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Pursuant to Florida law, the aggravating factors of *(insert aggravating factor)***and** *(insert aggravating factor)* **are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of** *(insert aggravating factor)* **and**

(insert aggravating factor) **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.**

Victim-impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent). **This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you may not consider this evidence as an aggravating factor.**

Give in all cases.

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that [the] [each] presented aggravating factor exists. You will be provided a form to make this finding [as to each alleged aggravating factor] and you should indicate whether or not you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that [one or more] [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Mitigating circumstances. § 921.141(7), Fla. Stat.

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance is anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

Among the mitigating circumstances you may consider are:
Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) **has no significant history of prior criminal activity.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) **is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. The First Degree Murder was committed while (defendant) **was under the influence of extreme mental or emotional disturbance.**

3. (Decedent) **was a participant in** (defendant's) **conduct or consented to the act.**

4. (Defendant) **was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**

5. (Defendant) **acted under extreme duress or under the substantial domination of another person.**

6. The capacity of (defendant) **to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**

7. (Defendant's) **age at the time of the crime.**

The judge should also instruct on any additional mitigating circumstances as requested.

8. The existence of any other factors in (defendant's) **character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings.

The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different

weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.

Weighing the evidence.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. **Did the witness seem to have an opportunity to see and know the things about which the witness testified?**

2. **Did the witness seem to have an accurate memory?**

3. **Was the witness honest and straightforward in answering the attorneys' questions?**

4. **Did the witness have some interest in how the case should be decided?**

5. **Did the witness's testimony agree with the other testimony and other evidence in the case?**

Give as applicable.

6. **Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?**

7. **Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?**

8. **Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?**

9. **Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?**

10. **Does the witness have a general reputation for [dishonesty] [truthfulness]?**

Law enforcement witness.

The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.

Expert witnesses.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Accomplices and Informants.

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.

Child witness.

You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

Give only if the defendant testified.

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

Witness talked to lawyer.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.

Give in all cases.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Give only if the defendant did not testify.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

Rules for deliberation.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.

2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.

3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.

Give #5 if applicable.

5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.

6. Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias. Your decisions must be based on the evidence and the law contained in these instructions.

Submitting case to jurors.

In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these instructions, the appropriate form[s] should be signed and dated by your foreperson.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Give if judge has allowed jurors to keep their electronic devices during the penalty phase.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].

Give if applicable.

During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.

Give a or b as appropriate.

a. The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.

b. If you wish to see an[y] exhibit[s], please request that in writing.

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

Comment

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018.

7.12 DIALOGUE FOR POLLING THE JURY (DEATH PENALTY CASE)

Members of the jury, we are going to ask each of you individually about the verdict[s] that you have just heard. The question[s] pertain to whether the verdict[s], as read by the clerk, [was] [were] correctly stated.

The following question is to be asked of each juror if the verdict is for the death penalty:
Do you, [*(name of juror)***] [juror number** *(number of juror)***], agree that each of the findings in the verdict form is yours?**

The following question is to be asked of each juror if the verdict is for a life sentence:
Do you, [*(name of juror)***] [juror number** *(number of juror)***], agree that at least one member of the jury voted for a sentence of life imprisonment without the possibility of parole?**

Comment

This instruction was adopted in 1981 and was amended in 1997, 2017 [214 So. 3d 1236], and 2018.

APPENDIX

H

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

INDICTMENT 76-532

STATE OF FLORIDA

VS

HENRY PERRY SIRECI, JR.
A/K/A BUTCH BLACKSTONE

FILED IN OPEN COURT
THIS 5 DAY OF Nov., 1976
R. P. Kirkland, Clerk
BY Anna Bortempo D.C.

ADVISORY SENTENCE

WE, A MAJORITY OF THE JURY, RENDERING AN ADVISORY SENTENCE TO THE COURT AS TO WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT OR DEATH, ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE A SENTENCE OF DEATH UPON THE DEFENDANT, HENRY PERRY SIRECI, JR., ALSO KNOWN AS BUTCH BLACKSTONE.

DATED AT ORLANDO, ORANGE COUNTY, FLORIDA, THIS 5th DAY OF NOVEMBER, 1976.

John B. May Jr.
FOREMAN

APPENDIX

I

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DIVISION: 14

Case Number: CR76-532

STATE OF FLORIDA,

Plaintiff,

vs.

HENRY PERRY SIRECI,

Defendant.
_____/

FILED IN OPEN COURT
THIS 20 DAY OF Apr, 1990
Fran Carlton, Clerk
BY _____ D.C.

V E R D I C T

✓ A MAJORITY OF THE JURY, BY A VOTE OF 11-1 ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON HENRY PERRY SIRECI.

_____ THE JURY ADVISES AND RECOMMEND TO THE COURT THAT IT IMPOSE A SENTENCE OF LIFE IMPRISONMENT UPON HENRY PERRY SIRECI, WITHOUT POSSIBILITY OF PAROLE FOR 25 YEARS.

SO SAY WE ALL.

DATED THIS 20 DAY OF APRIL, 1990

Larry G. Parker
FOREMAN OR FOREWOMAN

APPENDIX

J

IN THE SUPREME COURT OF FLORIDA

HENRY P. SIRECI
Appellant,

v.

SC17-1143

STATE OF FLORIDA
Appellee.

MOTION FOR REHEARING

Appellant Henry P. Sireci, through counsel, respectfully moves for rehearing of this Court's Opinion of January 31, 2018, denying Mr. Sireci's Successive Motion to Vacate his Sentence of Death. Mr. Sireci respectfully submits that this Court overlooked and misapprehended points of law and fact, and specifically neglected to review Mr. Sireci's substantial non-*Hurst* federal constitutional claims of violations of the Eighth Amendment and Equal Protection, which rested in part on his claim of actual innocence and continued denial of DNA testing. No claim previously raised is hereby abandoned.

The Opinion denying Mr. Sireci relief was one of 80 virtually identical Opinions that have been released by this Court in the last month. There was no individual analysis conducted in Mr. Sireci's case. Instead, this Court just issued a boilerplate two-page, four-paragraph Opinion stating what his jury recommendation was and the fact that his case was final in 1992. (Opinion, p. 2).

However, the Court specifically failed to address Mr. Sireci's claim that his death sentence is unreliable due to serious doubts over his guilt and the State's persistent refusal of DNA testing, and that failing to grant him a new penalty phase was a violation of the Eighth Amendment and Equal Protection.

This Court failed to address Mr. Sireci's federal constitutional claims that he was subjected to a trial and sentencing that involved problematic and unreliable fact-finding. Since his 1976 conviction and 1990 death sentence, the advent of DNA testing and improved forensic science significantly undermines the validity of his original conviction and sentence. Further, it is well established that flawed microscopic hair analysis, the lynchpin of the State's case against Mr. Sireci, is inherently unreliable. In fact, the hair evidence linking Mr. Sireci to the crime scene has never been subjected to DNA testing. In at least six other cases in an identical posture before this Court, the Court has allowed for additional briefing on "non-*Hurst* related issues." *See e.g. Spencer v. State,* SC17-1269. At the very least, Mr. Sireci should be entitled to full briefing on these claims.

In all death penalty cases, this Court, both because of the Eighth Amendment and because of the special role assigned to it by the laws and Constitution of Florida, is "required to conduct a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Davis v.*

State, 207 So. 3d 142, 172 (Fla. 2016)(internal quotations and citations omitted). Even if by issuing 80 identical opinions denying relief, without any individual analysis, this Court had not violated its duty to ensure that Florida's death penalty is uniformly and fairly administered, by allowing for additional briefing of "non-*Hurst* related issues" in some cases but not this one– notwithstanding the explicit request made herein (*see* Response on Order to Show cause, p. 2-3 and Response to State's Reply, p. 2-3) - this Court has been arbitrary in its evaluation of Florida's death penalty cases. Such disparate treatment is a violation of due process and equal protection under the law. See *Logan v. Zimmerman Brush Co*., 455 U.S. 422 (1982).

Mr. Sireci respectfully requests this Court allow additional and full briefing on his Eighth Amendment and Equal Protection violation, or, in the alternative, grant Rehearing and conduct an individual and specific analysis of his claims that were preserved and briefed before this Court.

Respectfully submitted,

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant CCRC

/s/ Julissa Fontán
Julissa Fontán
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Attorneys for Appellant

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 Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 15th day of February, 2018.

/s/Maria DeLiberato
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Supreme Court of Florida

MONDAY, FEBRUARY 26, 2018

CASE NO.: SC17-1143
Lower Tribunal No(s).:
481976CF000532000AOX

HENRY PERRY SIRECI vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby stricken.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

MARIA E. DELIBERATO
SCOTT A. BROWNE
CHELSEA RAE SHIRLEY
JULISSA FONTÁN