CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KONSTANTINOS X. FOTOPOULOS,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Hurst v. Florida* this Court struck down Florida's longstanding capital-sentencing procedures because they authorized a judge, rather than a jury, to make the factual findings that were necessary for a death sentence. On remand, the Florida Supreme Court held that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death.

The Florida Supreme Court then held that it would apply both the federal and state jury-trial rights retroactively to inmates whose death sentences had not become final as of June 24, 2002 (the date of *Ring v. Arizona*, precursor of *Hurst*) but that it would deny relief to inmates whose death sentences were final on that date.

Mr. Fotopoulos presents the following question:

Whether the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing impose limits upon a state court's power to declare unconventional rules of retroactivity, and whether those limits were transgressed here.

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PETITION FOR WRIT OF CERTIORARI

Konstantinos X. Fotopoulos respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Pro. 3.851. The opinion of the Circuit Court in and for Volusia County denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on January 29, 2018 in *Fotopoulos v. State*, 237 So.3d 911 (Fla. 2018), an opinion reproduced in Appendix B. Mr. Fotopoulos filed a timely motion for rehearing which was struck by the Florida Supreme Court on February 26, 2018 by an order reproduced in Appendix C.

JURISDICTION

The Florida Supreme Court's final judgment was entered on January 29, 2018. The Court struck a timely filed motion for rehearing on February 26, 2018. Mr. Fotopoulos sought an extension of time for the filing of this petition. (Application 17A1067). The Honorable Justice Thomas granted the Application extending the time for filing until June 28, 2018. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Case and Procedural History

Mr. Fotopoulos and co-defendant Deidre Hunt were indicted for two counts of first degree murder and other charges. The outcomes of their cases would eventually differ. In separate proceedings, both were sentenced to death by the trial court. The Florida Supreme Court affirmed Mr. Fotopoulos' convictions and death sentences on appeal. The Florida Supreme Court reversed Ms. Hunt's death sentence. *Hunt v. State*, 613 So.2d 893 (Fla. 1992). Before proceeding to a new penalty phase, the trial court granted her a new guilt phase as well. *State v. Hunt*, 687 So.2d 851(Fla. 5th DCA 1997). Ms. Hunt was convicted but not sentenced to death following retrial. *Hunt v. State*, 753 So.2d 609 (Fla. 5th DCA 2000).

Following conviction, Mr. Fotopoulos' advisory panel recommended death by 8-4 votes on each murder. The trial court imposed a death sentence for each murder. As the sole fact-finder, the court found aggravating and mitigating factors and weighed them without any factual determination by a jury.

Mr. Fotopoulos appealed his judgment of conviction and death sentences to the Florida Supreme Court. The Court affirmed the judgment of conviction and death sentences on appeal. *Fotopoulos v. State*, 608 So.2d 784 (Fla. 1992). This Court denied certiorari. *Fotopoulos v. Florida*, 508 U.S. 924 (1993).

Mr. Fotopoulos sought postconviction relief in the trial

court. The trial court denied relief and Mr. Fotopoulos appealed and filed a state petition for a writ of habeas corpus. The Florida Supreme Court affirmed the denial of postconviction relief and denied the petition. *Fotopoulos v. State*, 838 So.2d 1122 (Fla. 2002). In the petition, years before this Court's decision in *Hurst v. Florida*, Mr. Fotopoulos raised a claim based on *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and supplemented the claim after *Ring v. Arizona* issued. The Florida Supreme Court ruled:

> In the third claim contained in his habeas petition, Fotopoulos asserts that the Florida death sentencing statute is unconstitutional under the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Fotopoulos has previously asserted the substance of this exact claim in the direct appeal of his conviction and sentence. *See* Fotopoulos v. State, 608 So.2d 784, 787 (Fla.1992). This Court recently addressed this precise contention in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002), concluding that Florida's system of imposing the death penalty is not constitutionally infirm. As the claim that the Florida capital sentencing scheme is unconstitutional has been decided adversely to Fotopoulos' contentions, his assertions are without merit.

Fotopoulos v. State, 838 So. 2d 1122, 1136 (Fla. 2002).

Mr. Fotopoulos also raised in the state postconviction motion that the State presented inconsistent theories of prosecution in Mr. Fotopoulos' trial and Ms. Hunt's trial, respectively. At Ms. Hunt's trial the State portrayed her as equally culpable as Mr. Fotopoulos in the murders in order to obtain a death sentence against her. At Mr. Fotopoulos' trial, the State transformed Ms.

Hunt into the equivalent of a battered spouse that was under the control of Mr. Fotopoulos. The State was able to obtain a bare majority death recommendation for Mr. Fotopoulos with the inconsistent theory because Mr. Fotopoulos' trial counsel did not confront the State's use of markedly different versions of the truth.

Having been denied relief in state court on the claims based on the State's inconsistent theories, Mr. Fotopoulos sought relief in United States District Court by filing a Petition for a Writ of Habeas Corpus. The district court granted the petition in part and denied it in part. The district court granted penalty phase relief on what the court characterized as claims 10(d) and 11(g). The district court shared Florida Supreme Court Justice Lewis':

> "grave concerns as to the State's conduct during the trials of the separate but related Hunt and Fotopoulos charges." *Fotopoulos*, 838 So.2d at 1137 (Lewis, J., concurring in result only). The United States Supreme Court has long recognized that a prosecutor's preeminent duty is not to win a case, but to that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). As a representative of the sovereign, a prosecutor must earnestly and vigorously prosecute actions; however, "while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper method calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*.

App. D at 41-42. The district court then found:

> In the instant case, it is clear that the State presented starkly inconsistent positions as to Ms. Hunt's relative culpability in the crimes. During her initial sentencing proceedings, the State vigorously argued that she was a

> cold-blooded, premeditated murderer who was not dominated or coerced by anyone. In contrast, at Petitioner's trial, the State presented evidence that he dominated and controlled Ms. Hunt to the point that she was essentially a "battered woman."
>
> Based on the testimony at the Rule 3.850 hearing, there can be no doubt that Petitioner's trial counsel had ample bases upon which to establish the inconsistencies in the State's positions regarding Ms. Hunt's relative culpability.

App. D at 42.

Specifically, on the ineffectiveness of trial counsel, the district court found that trial counsel's "failure to focus on the State's inconsistent portrayal of Ms. Hunt was not a 'strategic decision.'" App. D at 43. Instead, the court found that it was an inexplicable decision "to ignore or abandon a critical opportunity to impeach the State's case . . .." App. D at 43.

For the district court, the "critical issue" was Mr. Fotopoulos' "relative culpability from a sentencing standpoint." App. D. at 44. The jury which "'knew' Ms. Hunt had been dominated by [Mr. Fotopoulos]" and still had received the death penalty, "had little rational choice but to impose the same penalty on [Mr. Fotopoulos]." App. D at 44. This "had a profound impact on [Mr. Fotopoulos'] jury." "Even so, the jury vote to impose death was eight to four -- a two vote swing between life and death." App. D. at 45. In concluding that the first prong of *Strickland v. Washington*, 466 U. S. 668 (1984), had been met, the district court stated that Mr. Fotopoulos':

> [D]ominant role in the murders was a major theme of the State's case against him, especially in relation to the death sentence. Yet, defense counsel failed to exploit the blatantly inconsistent evidence offered by the State in Ms. Hunt's case. Had defense counsel done so, it would not only have impeached Ms. Hunt's testimony, it would have brought into question the integrity and credibility of the prosecution itself. There can be no more powerful defensive tactic than the impeachment of one's opponent. And defense counsel offered no particular explanation for declining to do so. Thus, it cannot be said that this was a mere strategic decision. Rather, it was a critical failure, and like Justice Lewis, this Court finds trial counsel's failure to pursue this line of attack to be outside prevailing professional standards. *Fotopoulos*, 838 So. 2d at 1139 (Justice Lewis concurring in result only). Therefore, the first prong of *Strickland* has been satisfied, and the state courts' determination to the contrary was objectively unreasonable.

App. D at The court noted that:

> The powerful impact of such an approach is underscored by the state trial judge's findings regarding Ms. Hunt's resentencing. In determining that Ms. Hunt had established the mitigating circumstance of extreme duress or the substantial domination of another person, the trial court stated that the "defense offers as further evidence and virtual admissions by the State of this mitigating circumstance, statements made by the prosecution during the Fotopoulos trial . . ." (Doc. No 44, May 7, 1998, Judgment and Sentence of Deidre Michelle Hunt at 1220).

App. D at 44, n.14.

While the district court's discussion of the first prong of *Strickland* showed prejudice, the court added further analysis. The district court found that it was:

> at least reasonably probable that the presentation of

> the State's "blatantly inconsistent evidence and arguments," *Fotopoulos*, 838 So. 2d at 1139 (Lewis, J., concurring in result only), would have fundamentally changed the calculus concerning [Mr. Fotopoulos'] sentence. The prosecution's closing argument at least implied that Ms. Hunt received the death penalty *because* of Petitioner's actions. Ms. Hunt was portrayed as yet another victim - - not only had Petitioner abused and terrorized her, he was now, in essence responsible for her death as well. And if Petitioner's "victim" was being sentenced to death, how could any jury be expected not to sentence him to death as well?

App. D. at 45. The district court noted that during closing argument the prosecutor stated, "'Deidre Hunt is much like the person who has a bullet put to their chest and is lying there bleeding to death and knowing that she is about to go down to the count, points that accusing finger to the person that put her where she is.'" App. D at 45.

On Ground 11(g) the district court found that this issue was properly raised in Mr. Fotopoulos' amended 3.850 motion in claim III and exhausted on appeal. On appeal the Florida Supreme Court affirmed the trial court's denial of relief. App D. at 46-47.

The court relied upon the inconsistencies discussed above and held that the prosecutor's misconduct in this regard was a due process violation which prejudiced Mr. Fotopoulos' right to a fair sentencing procedure. When the district court considered the State's "markedly inconsistent positions" in the context of Mr. Fotopoulos' penalty phase proceedings the district court concluded: "that the inconsistencies were at the core of the State's penalty

phase case and rendered Petitioner's death sentences unreliable." The district court found that "the prosecutor's misconduct regarding this matter amounted to a due process violation which prejudiced Petitioner's right to a fair sentencing proceeding." App. D. at 49.

The State appealed to the United States Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit reversed the district court and took away Mr. Fotopoulos' relief. *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229 (11th Cir. 2008). The court found that the Florida Supreme Court's decision that trial counsel was not ineffective was not an unreasonable application of *Strickland*. *Id*. 1234 (11th Cir. 2008). The court found that even if it assumed that trial counsel's performance was defective, the court did not find prejudice because "Mr. Fotopoulos did not dispute his primary responsibility . . ." *id.*, despite Mr. Fotopoulos' plea of not guilty and exercise of his right to trial.

The court found that Mr. Fotopoulos was not entitled to relief on the prosecutions' use of the disparate theories because there was no clearly established law "'contrary to . . . clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1), when the only decision of the Supreme Court of the United States mentioned by the district court was decided twelve years later. Moreover, [this] Court did not hold that the use of inconsistent theories in the prosecution of two defendants

violates the right to due process." *Id*. at 1235.

Mr. Fotopoulos petitioned this Court for a Writ of Certiorari to the Eleventh Circuit, which this Court denied. *Fotopoulos v. McNeil*, 555 U.S. 899, 129 S. Ct. 217 (2008).

Following *Hurst v. Florida*, 136 S. Ct. 616 (2016), Mr. Fotopoulos filed a Successive Motion to Vacate Judgment and Sentence based on *Hurst*, *Hurst v. State,* 202 So.3d 40 (Fla. 2016) and issues derived therefrom. The trial court denied Mr. Fotopoulos' motion. The trial court found:

> The Florida Supreme Court has held that *Hurst*, which implicated *Ring* and *Apprendi*, should not be applied retroactively to defendants whose death sentences became final before the issuance of *Ring*, or before June 24, 2002. *Asay v. State*, 210 So. 3d .1, 22 (Fla. 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017). In the instant case, Defendant's death sentence became final on May 17, 1993, when the United States Supreme Court denied Defendant's petition for writ of certiorari. Thus, Defendant is not entitled to relief under *Hurst* because his sentence became final before *Ring*.
>
> The undersigned judge has the utmost respect and admiration for the highest court of the state and is legally duty-bound to follow the law as specified in *Asay*. The undersigned judge, however, agrees with the dissenting opinions of Justice Pariente and Justice Perry in *Asay*, in that *Hurst* should be applied retroactively to all death sentences considering the finality of death and that "death is different." The retroactive application of *Hurst* to a certain date results in an arbitrarily drawn line for death sentences which became final before and after June 24, 2002. Nonetheless, as an officer of the court, I must follow the law of the land.

(Appendix A).

Mr. Fotopoulos appealed to the Florida Supreme Court. The Florida Supreme Court stayed briefing pending its decision in *Hitchcock v. State*. On September 22, 2017, the Florida Supreme Court required Mr. Fotopoulos to "show cause [ ], why the trial court's order should not be affirmed in light of [the Florida Supreme] Court's decision *Hitchcock v. State*, SC17-445." On January 29, 2018, the Florida Supreme Court affirmed the lower court's denial of postconviction relief.

Justice Pariente concurred because the Florida Supreme Court's opinion in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017) had become final. Nevertheless, Justice Pariente "continue[d] to adhere to the views expressed in [Justice Pariente's] dissenting opinion in *Hitchcock*.

2. The Florida Supreme Court's Decisions Following *Hurst V. Florida*.

The Florida Supreme Court has only allowed for limited retroactive application of this Court's decision in *Hurst v. Florida*, and its own decision in *Hurst v. State,* despite finding that under Florida's death penalty scheme unanimous jury verdicts are required to meet the demands of the Florida Constitution and the Eighth Amendment. The Florida Supreme Court drew a line based on the date each individual case became final in relation to the date this Court issued *Ring v. Arizona*, 536 U.S. 584,122 S.Ct. 2428 (2002).

In *Ring*, this Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id*. at 589, 2432. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court stated the crux of *Ring*, that:

> "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

Hurst, 136 S.Ct. at 621. (Internal citations omitted). This Court applied *Ring* directly to Florida's death penalty system and found:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

> As with Timothy Ring, the maximum punishment Timothy *Hurst* could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased *Hurst*'s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 621-22.

On remand, a majority of the Florida Supreme Court applied this Court's decision in *Hurst* to Florida's death penalty system and held,

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

Hurst v. State, 202 So.3d at 44. The court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution and that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding:

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

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict

resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

In *Perry v. State*, 210 So.3d 630 (Fla. 2016) a majority of the Florida Supreme Court found Florida's first post-*Hurst* revision of the death penalty statute was unconstitutional and found:

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst.* In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. *Hurst,* 202 So.3d at 44–45. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at 53–54, 59–60.

Id. at 633.

When addressing the question of retroactivity of *Hurst v. Florida* and its own decision in *Hurst v. State*, a majority found that *Hurst v. Florida* applies retroactively to cases that became final after *Ring v. Arizona* but not before. In *Mosley v. State,* 209 So.3d 1248, 1275 (Fla. 2016), the majority found that *Hurst* and *Hurst v. State* applied retroactively to cases which became final after *Ring v. Arizona* was issued. The majority analyzed

retroactivity under the fundamental fairness approach of *James v. State*, 615 So.2d 668 (Fla. 1993) and the approach of *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980).

The majority found that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under the fundamental fairness approach of *James* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn . . .." *Id.* at 1275.

The majority also found *Hurst v. Florida and Hurst v. State* retroactive to Mr. Mosley's case under Florida's *Witt* standard. *Id.* at 1276. The *Witt* standard grants retroactive application of changes in the law if,

> ". . .the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. Determining the retroactivity of a holding "requir[es] that [th[e] Florida Supreme] Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." *Id*. at 924–25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. *See id*. at 925.

Id. The majority decided that the first two prongs were met because *Hurst v. State* and *Hurst v. Florida* emanated from this Court and the Florida Supreme Court and were constitutional in nature. *Id.* The third prong required the majority to decide whether the change in the law was a development of fundamental significance. As the

majority explained,

> To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. We conclude that *Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from Stovall14 and Linkletter, which we address below. *Id.*
>
> The three-fold test of *Stovall* and *Linkletter* requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So.2d at 926; *Johnson*, 904 So.2d at 408.

Id. at 1276–77.

The majority found the threefold test of *Stovall* and *Linkletter* was met. *Id*. at 1277. The majority declared that the purpose of the new rule announced in *Hurst v. Florida* is,

> to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I, section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. *See Hurst*, 202 So.3d at 57.

Id. The majority concluded,

> Thus, because *Hurst v. Florida* held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and Hurst further emphasized the critical importance of a unanimous verdict within Florida's independent

> constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of these holdings weighs heavily in favor of retroactive application.

Id. at 1278. The majority found that, as far as post-*Ring* cases were concerned, "fairness strongly favors applying *Hurst* retroactively to" the time that *Ring* was issued. *Id.* at 1280. The majority found that, "From *Hurst* [v. State], it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*. *Id*. at 1280

Lastly, the majority found that the effect on the administration of justice would not be so great as to deny retroactive application to the post-*Ring* cases. *Id.* at 1281. The majority considered that:

> Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So.2d at 929–30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements," the former being those that justify retroactive application and the latter being those that do not.

Id. at 1281–82. The Court found that it did not so burden the administration of justice because,

> capital punishment "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So.2d at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Id. at 1282.

While this decision was correct, and fair, it was not based on anything about the nature of the crime or Mr. Mosley's mitigation. Certainly, relief was appropriate, but the majority's basing the decision on the finality date of Mr. Mosley's case had no relation to the actual wrongfulness of the constitutional violations it remedied, the nature of Mr. Mosley's case or the actual functioning of Florida's death penalty scheme.

The Florida Supreme Court considered retroactivity of *Hurst v. Florida* for *pre-Ring* cases and came to an entirely different conclusion in *Asay v. State,* 210 So.3d 1, 15 (Fla. 2016). The majority found that *Hurst v. Florida* did not apply retroactively to allow relief for Mr. Asay under just the Sixth Amendment.

In *Asay*, the majority held:

> After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst*

> retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

Id. at 22. The majority found that the first prong of the *Stovall/Linkletter* test, the "purpose of the new rule" weighed in Mr. Asay's favor. The majority discussed that the importance of the right to a jury trial under the United States and Florida Constitutions which "th[e Florida Supreme] Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life[ ]." *Id.* at 18. The majority found that the reliance on the old rule weighed "against retroactive application of *Hurst v. Florida*" to Mr. Asay's pre-*Ring* case. *Id*. at 19. The majority found this Court had previously relied upon Supreme Court precedent and the breadth of the Court's prior reliance.

Lastly, the majority considered the "Effect on the Administration of Justice." The majority recognized that the Florida Supreme Court's prior analysis of the retroactivity of *Ring* under the first prong of *Witt* "was impacted by an incorrect understanding of the Sixth Amendment claim . . .." The majority found that the Court's conclusion in *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005) that "to apply *Ring* retroactively in Florida would . . . 'would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings'" was correct. *Id*. at 22; *citing Johnson* at 412.

REASONS FOR GRANTING THE WRIT

1. THE FLORIDA SUPREME COURT'S DENIAL OF RETROACTIVE APPLICATION OF *HURST V. FLORIDA* AND RETROACTIVE APPLICATION OF THE CASES THAT FOLLOWED WAS UNCONSTITUTIONAL AND LEFT BEHIND CASES IN WHICH DEATH IS LESS JUSTIFIED AND LESS RELIABLE.

The Florida Supreme Court's denial of 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), violated Mr. Fotopoulos' 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))and *Johnson v. Mississippi*, 486 U.S. 578, 584-585, 587 (1988).

This case arises at the intersection of two principles that have become central fixtures of the Court's jurisprudence over the past four and a half decades:

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*id*. at 428). This principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989) recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The Court has struck a balance between the two principles by

honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g.*, *Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But the Florida Supreme Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers:

What the two groups have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial – a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century.[1]

The ways in which the two groups differ are more complex. Notably:

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[1] See *Spaziano v. Florida*, 468 U.S. 447 (1984; *Hildwin v. Florida*, 490 U.S. 638 (1989 and *Bottoson v. Florida,* 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002).

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S.Ct. 470 (2016), longer than their 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. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari).

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence – or even a capital prosecution – under the

conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences.[2] Thus, we can be sure

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[2] See, *e.g.*, BRANDON L. GARRETT, END OF ITS ROPE 79-80 and figure 4.1 (Harvard University Press 2017); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2016: YEAR END REPORT 2 – 5 (2016); Death Penalty Information Center, *Facts About the Death Penalty* (updated July 28, 2017), p. 3, *available at https://deathpenaltyinfo.org/documents/FactSheet.pdf.*

A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of capital mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. See, *e.g.*, Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23 (2005); Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, 3:3 INDIGENT DEFENSE 1 (National Legal Aid and Defender Association, July/August 1999 *available at* https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/why-mit-specs.authcheckdam.pdf; Jeffrey Toobin, *Annals of the Law: The Mitigator*, THE NEW YORKER, May 9, 2011, pp. 32-39. It is fair to say that capital sentencing trials conducted since 2000, when this Court put the legal community on notice regarding the vital importance of developing mitigating evidence (see *Williams v. Taylor*, 529 U.S. 362 (2000)), have been far more likely to present a full picture of relevant sentencing information than pre-*Williams* trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), Guidelines 4.(A)(1) and 10.4(C)(2)(a), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003); and see *id.* at 959-960. Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized. See, *e.g.*, *Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

Another significant factor appears to be that public support for the death penalty is waning. *Compare* Alan Judd, "Poll: Most Favor New Execution Method" *Gainesville Sun*, February 18, 1998,

that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2018 standards. We cannot say which specific cases would or would not with certainty; but it is plain generically – and even more plain in cases where the jury was divided in its penalty recommendation,

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p. 1 ("Asked whether convicted murderers should be put to death or sentenced to life in prison, 68 percent chose execution. Twenty-four percent preferred life prison terms, while 8 percent offered no opinion.") *with* Craig Haney, "Column: Floridians prefer life without parole over capital punishment for murderers," *Tampa Bay Times*, Tuesday, August 16, 2016, 3:46 p.m., *available at http://www.tampabay.com/opinion/columns/column-floridians-prefer-life-without-parole-over-capital-punishment-for/2289719* (In "a recent poll of a representative group of nearly 500 jury-eligible Floridians. . . . when respondents are asked to choose between the two legally available options — the death penalty and life in prison without parole — Floridians clearly favor, by a strong majority (57.7 percent to 43.3 percent), life imprisonment without parole over death. The overall preference was true across racial groups, genders, educational levels and religious affiliation.") Although direct comparison of these 1998 and 2016 poll results is not possible because the 1998 report does not specify either the precise nature of the population sampled or the exact form of the question asked, the general trend suggested by the two polls is consistent with the evolution of popular opinion regarding the death penalty reflected in national polling and other indicia. See Death Penalty – Gallup Historical Trends – Gallup.com, *available at* http://www.gallup.com/poll/1606/death-penalty.aspx (between 1985 and 2001, the median percentage of the population favoring death was 54.5 %; the median percentage of the population favoring LWOP was 36 %; between 2006 and 2014, the median percentage favoring death was 49%; the median percentage favoring LWOP was 46 %); *Glossip v. Gross*, 135 S.Ct. 2726, 2772-2775 (2015) (Justice Breyer, joined by Justice Ginsburg, dissenting), citing, *e.g.*, Reid Wilson, "Support for Death Penalty Still High, But Down," *Washington Post*, GovBeat, June 5, 2014, online at www. washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down.

as it was (8-4) in Mr. Fotopoulos' case – that some inmates condemned to die before *Ring* would receive less than capital sentences today.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding.

The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence – flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth – that was accepted without question in pre-*Ring* capital trials.[3] Doubts that

[3] See EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (REPORT OF THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY [September 2016], *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L. J. 1001 (2008); Paul C. Giannelli, *Wrongful Convictions and Forensic Science The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013); Simon A. Cole *Response: Forensic Science Reform: Out of the Laboratory*

would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today.

Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving

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and into the Crime Scene, 91 TEX. L. REV. SEE ALSO 123 (2013); Michael Shermer, *Can We Trust Crime Forensics?*, SCIENTIFIC AMERICAN, September 1, 2015, *available at* http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; *2016 Flawed Forensics and Innocence Symposium*, 119 W. VA. L. REV. 519 (2016); Alex Kozinski, *Rejecting Voodoo Science in the Courtroom*, WALL STREET JOURNAL, September 19, 2016, *available at* https://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199. And see, illustratively, *William Dillon, available at https://www.innocenceproject.org/cases/william-dillon/.*

the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor does opt to seek a penalty retrial[4] and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, considerations (A) through (D) make it plain that the particular application of non-retroactivity resulting from the Florida Supreme Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse. This Court should grant certiorari and consider whether it rises to a degree of capriciousness and inequality that violates the Eighth Amendment and Equal Protection respectively.

2. MR. FOTOPOULOS' CASE SHOWS THE INJUSTICE OF ALLOWING THE PRE-*RING* CONDEMNED TO REMAIN SENTENCED TO DEATH UNDER AN UNCONSTITUTIONAL SYSTEM AND THE SCOPE OF THE CONSTITUTIONAL VIOLATIONS THAT RESULTED FROM THE FLORIDA'S ARBITRARY RETROACTIVITY SPLIT.

Mr. Fotopoulos' case shows the peril of the Florida Supreme

[4] But see the preceding point (C).

Court's retroactivity split. Mr. Fotopoulos remains sentenced to death despite the limited fact-finding in his case being flawed by the inconsistent theories used by the State to obtain Mr. Fotopoulos' death sentence. Mr. Fotopoulos did not receive a fair trial to determine his death sentence under the standards of the time or what will apply to post-*Hurst* cases in Florida. Those fortunate enough to have their case become final after this Court's opinion in *Ring* that have received retrials will. This Court should grant certiorari.

While *Bradshaw v. Stumpf*, 545 U.S. 175, (2005) came after Mr. Fotopoulos' trial, it has always been the case that, as Justice Thomas stated in concurrence,

> The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention. See ante, at 2408 (SOUTER, J., concurring) (noting that Wesley's jury was informed that Stumpf had already been sentenced to death for the crime).

Bradshaw v. Stumpf, 545 U.S. 175, 191–92(2005). Mr. Fotopoulos did not receive what was obvious to Justice Thomas because trial counsel failed to bring the State's conflicting theory to the attention of the advisory panel.

It is unlikely that Mr. Fotopoulos would be sentenced to death today if an actual jury heard that the State pursued a markedly

different theory of prosecution and that Ms. Hunt eventually received life. His case would not be found to be one of the most aggravated and least mitigated in light of evolving standards of decency, thus placing his case outside the category of cases in which the death penalty is allowed.

While the Eleventh Circuit may have reversed the district court based on the arduous standards of AEDPA, this does not obviate the flaws in even the unconstitutional fact-finding that occurred in Mr. Fotopoulos' case when the judge alone made the factual determinations necessary for Mr. Fotopoulos to receive death. If Mr. Fotopoulos was tried on the issue of the applicability of the death penalty under Florida's now constitutional system, it would be certain that one or more attorneys acting as the counsel envisioned by the Sixth Amendment would impeach the State's theory. Under current Florida law, the State would be unable to obtain a unanimous jury verdict, especially when even with the unimpeached advantage of the conflicting theory, the State could only obtain an 8-4.

Mr. Fotopoulos' death sentence no longer reflects that his case is one of the most aggravated and least mitigated. Cases far worse than Mr. Fotopoulos' will not result in death sentences when placed before an actual jury that must return a unanimous verdict on the application of the death penalty. Based on the greater fact-finding that followed *Hurst v. State*, the standards of decency in

Florida have evolved to limit death to cases in which a unanimous jury is required to find that the State has proved each aggravating factor beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors, and that death should be imposed. Mr. Fotopoulos had none of these findings in his case. The Florida Supreme Court's retroactivity split has left behind cases that would not result in a death sentence if tried under the current death penalty scheme in Florida because the State would not be able to meet its burden of proof to a jury or because better mitigation would be presented under today's knowledge and understanding.

Mr. Fotopoulos remains sentenced to death not because his case is one of the most aggravated and least mitigated but because of where his case fell on the calendar. Mr. Fotopoulos was sentenced to death without the reliability of jury fact-finding and unanimity and without consideration by the panel that recommended a death sentence by a mere 8-4 that the State presented "markedly inconsistent" theories. His death sentence violates the Eighth and Fourteenth Amendments because it is contrary to evolving standards of decency and because his case is not the most aggravated and least mitigated when it is considered that the post-*Ring* cases will have a unanimous determination that such is true. Based on the particulars of Mr. Fotopoulos' case, and the general questions of constitutionality, this Court should grant

certiorari.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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