**No. _____**

IN THE

# Supreme Court of the United States

NORMAN M. GRIM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Florida*

## PETITIONER'S APPENDIX

***THIS IS A CAPITAL CASE***

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## INDEX TO APPENDIX[1]



[1] Voluminous attachments to the circuit court's May 9, 2017 order (Exhibit 4), and Petitioner's brief responding to the Florida Supreme Court's order to show cause (Exhibit 6), are omitted from this appendix, but are publicly accessible on the Florida Supreme Court's electronic docket (http:// http://onlinedocketssc.flcourts.org/), and can also be provided by the undersigned upon request.

# EXHIBIT 1

# Supreme Court of Florida

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No. SC17-1071

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**NORMAN MEARLE GRIM,**
Appellant,

vs.

**STATE OF FLORIDA,**
Appellee.

[March 29, 2018]

PER CURIAM.

Norman Mearle Grim, a prisoner under sentence of death, appeals the circuit court's order summarily denying his first successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

In 2000, a jury convicted Grim of first-degree murder and sexual battery upon a person twelve years of age or older with use of a deadly weapon. After hearing evidence at the penalty phase, the jury unanimously recommended the death sentence by a vote of twelve to zero. We affirmed Grim's convictions and sentence of death on direct appeal. *Grim v. State*, 841 So. 2d 455 (Fla. 2003). We

also upheld the denial of his initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Grim v. State*, 971 So. 2d 85 (Fla. 2007).

In June 2016, Grim filed his current first successive postconviction motion in which he sought relief based on *Hurst v. Florida* (*Hurst v. Florida*), 136 S. Ct. 616 (2016). Grim subsequently filed a memorandum of law in which he further argued that he was entitled to relief based on this Court's decision in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). In May 2017, the circuit court entered an order summarily denying Grim's successive postconviction motion. This appeal followed. While Grim's postconviction case was pending in this Court, we directed the parties to file briefs addressing why the circuit court's order should not be affirmed based on this Court's precedent in *Hurst*, *Davis v. State*, 207 So. 3d 142 (Fla. 2016), *cert. denied*, 137 S. Ct. 2218 (2017), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

In *Davis*, this Court held that a jury's unanimous recommendation of death is "precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death" because a "jury unanimously f[inds] all of the necessary facts for the imposition of [a] death sentence[] by virtue of its unanimous recommendation[]." *Davis*, 207 So. 3d at 175. This Court has consistently relied on *Davis* to deny *Hurst* relief to defendants that have received a unanimous jury recommendation of death. *See, e.g.*, *Bevel v. State*, 221 So. 3d 1168, 1178 (Fla.

2017); *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017), *petition for cert. filed*, No. 17-7171 (U.S. Dec. 18, 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017), *petition for cert. filed*, No. 17-7545 (U.S. Jan. 24, 2018); *Morris v. State*, 219 So. 3d 33, 46 (Fla.), *cert. denied*, 138 S. Ct. 452 (2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018); *Oliver v. State*, 214 So. 3d 606, 617-18 (Fla.), *cert. denied*, 138 S. Ct. 3 (2017); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018); *Truehill v. State*, 211 So. 3d 930, 956-57 (Fla.), *cert. denied*, 138 S. Ct. 3 (2017). Grim is among those defendants who received a unanimous jury recommendation of death, and his arguments do not compel departing from our precedent.[1]

Accordingly, because we find that any *Hurst* error in this case was harmless beyond a reasonable doubt, we affirm the circuit court's order summarily denying Grim's first successive motion for postconviction relief.

It is so ordered.

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

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1. The fact that Grim declined to present mitigation to the jury during the penalty phase has no bearing here. Grim's waiver of that right was valid, and he "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Jones v. State*, 212 So. 3d 321, 343 n.3 (Fla.) (quoting *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 672 (2017)), *cert. denied*, 138 S. Ct. 175 (2017).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., dissenting.

The majority relies on the jury's unanimous recommendation for death to determine that the *Hurst*[2] error is harmless beyond a reasonable doubt. However, for the same reasons set forth in my concurring in part, dissenting in part opinion in *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *petition for cert. filed*, No. 17-8148 (U.S. Mar. 14, 2018), I would reverse for a new penalty phase because the jury was not presented with any evidence of the significant mitigation in Grim's case, which the trial judge subsequently heard, before making its recommendation. Due to the jury's critical role in capital sentencing after *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst*, unless the defendant waives his right to a penalty phase jury, available mitigation must be presented to the jury.

**FACTS**

After being convicted of first-degree murder and sexual battery upon a person twelve years of age or older with the use of a deadly weapon, Grim "insisted on not presenting any mitigation" to the jury during the penalty phase. *Grim v. State* (*Grim I*), 841 So. 2d 455, 459 (Fla. 2003). Grim explained to the

2. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

trial judge at the *Koon*[3] hearing that he would rather receive the death penalty than spend the rest of his life in prison. After a penalty phase, in which the jury did not hear any evidence of mitigation, the jury unanimously recommended that Grim be sentenced to death. *Id.*

Despite the absence of mitigating evidence, pursuant to this Court's opinion in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), the trial court was obligated to determine the existence of mitigation anywhere in the record and had the discretion to appoint special counsel to present mitigation. *Id.* at 364-65. Accordingly, the trial court appointed special counsel to present available mitigating evidence at the *Spencer*[4] hearing.

After the *Spencer* hearing, the trial court found three aggravating factors, three statutory mitigating circumstances, and five nonstatutory mitigating circumstances. *Grim I*, 841 So. 2d at 460. The three statutory mitigating circumstances were: (1) disruptive home life and child abuse; (2) hard-working employee; and (3) mental health problems that did not reach the level of section 921.141(6)(b), Florida Statutes (1997). *Id.* The nonstatutory mitigating circumstances were: "(1) lack of long-term psychiatric care"; (2) "marital problems

3. *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993).

4. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

and situational stresses"; (3) "errors of judgment under stress"; (4) "model prison inmate"; and (5) "entered prison at a young age." *Id.*

As to statutory mental mitigation, the trial court's sentencing order explained that the evidence presented by special counsel—which included the deposition testimony of psychologist Dr. James Larson and a 1983 psychiatric evaluation by Dr. B. R. Ogburn—established the following: (1) Grim "suffers from an impulse-control disorder known as 'intermittent explosive disorder' along with a depressive disorder"; (2) a diagnosis of "antisocial personality disorder"; (3) a diagnosis of "having a '[p]ersonality disorder, mixed type with avoidant, antisocial and passive-aggressive features' "; and (4) at the time of the murder, Grim "was taking two medications, Prozac and Depakote, which were targeted for the intermittent explosive disorder," however the impact of the medications was not established.[5]

As to other statutory mitigating circumstances, the trial court determined that Grim (1) "had a disruptive home life," which "certainly had an impact upon him," (2) had a "shining" employment background since returning to Northwest Florida on parole from Texas; (3) had "a history of alcohol usage," which included being

5. The sentencing order stated that although "Dr. Larson was comfortable in saying the murder did *not* occur while the Defendant was 'experiencing psychosis in the sense of responding to delusions or hallucinations,' . . . Dr. Larson could not rule out some kind of drug interaction with the Defendant's disorders."

"discharged from the military for substance related charges," and (4) "suffers from significant, long-term mental problems." This Court's case law makes clear "the importance and significance of this kind of mitigation evidence." *Williams v. State*, 987 So. 2d 1, 14 (Fla. 2008).

As to nonstatutory mitigating circumstances, the trial court determined that Grim (1) received psychiatric care in 1983; (2) "was in the throes of a divorce at the time of this murder" and "had even sought legal advice from his victim"; (3) makes " 'appalling errors of judgment' when under stress"; (4) had "been a model inmate . . . for over two years while awaiting trial"; and (5) "was first confined for a short time while in the Navy" at twenty-two years old. After weighing the aggravation and mitigation and "duly consider[ing] the jury recommendation," the trial court sentenced Grim to death.

On direct appeal, consistent with *Muhammad*, this Court denied Grim's claim that the trial court should have required special counsel to present mitigation evidence to the penalty phase jury, stating: "We . . . continue to hold that a trial court should not be required to appoint special counsel for purposes of presenting mitigating evidence to a penalty phase jury if the defendant has knowingly and voluntarily waived the presentation of such evidence." *Grim I*, 841 So. 2d at 461. In my specially concurring opinion, I wrote that "I would adopt a uniform procedure requiring the appointment of special counsel to present available

mitigation." *Id.* at 465 (Pariente, J., specially concurring). This kind of procedure has yet to be adopted.

## ANALYSIS

In 1978, in *Goode v. State*, 365 So. 2d 381 (Fla. 1978), this Court stated:

> [E]ven though [the defendant] expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts.

*Id.* at 384. Subsequently, the Court set forth various procedures for doing so but, as explained above, left any presentation of mitigating evidence beyond the presentence investigation report to the trial court's discretion. *Muhammad*, 782 So. 2d at 364.

Concurring specially in *Muhammad*, I set forth a proposed procedure for trial courts appointing special counsel to present mitigation to the jury when a defendant waives the same:

> Because of the tremendous responsibilities placed on the trial court and this Court in death penalty cases, rather than leave the appointment of counsel to the trial court's discretion on a case-by-case basis, *I would thus adopt a prospective rule that would provide for the appointment of special counsel to present available mitigation for the benefit of the jury*, the trial court and this Court in order to assist the judiciary in performing our statutory and constitutional obligations.

*Id.* at 370 (Pariente, J., specially concurring) (emphasis added).

In 2017, on remand from the United States Supreme Court's decision in *Hurst v. Florida*, this Court made clear in *Hurst* that the death penalty "must be

reserved only for defendants convicted of the most aggravated and *least mitigated* of murders," as determined by a jury. 202 So. 3d at 60 (emphasis added). Therefore, "*Hurst* changed the calculus for waiving the presentation of some or all of the mitigating evidence to a jury." *Kaczmar*, 228 So. 3d at 16 (Pariente, J., concurring in part and dissenting in part). Thus, in light of *Hurst v. Florida* and *Hurst*, which "clearly changed the dynamics between the judge and the jury in Florida capital sentencing," *id.*, this Court should adopt a "prospective rule that would provide for the appointment of special counsel to present available mitigation for the benefit of the jury," whose role we now know is critical to the constitutional imposition of the death penalty. *Muhammad*, 782 So. 2d at 370 (Pariente, J., specially concurring).

Regardless of whether this Court alters the requirements of *Muhammad*, it is clear that trial courts and litigants have an independent obligation to ensure that the jury, as sentencer, receives all the necessary information to make the constitutionally required findings of fact before recommending a sentence of death. *See Hurst*, 202 So. 3d at 44. Those findings, of course, include finding unanimously the existence of each aggravating factor, the sufficiency of the aggravators to impose death, that the aggravation outweighs the mitigation, and, finally, a unanimous vote that death is the appropriate sentence. *See id.*

Aside from addressing this issue prospectively, the question arises how a defendant waiving mitigation affects whether a *Hurst* error is harmless beyond a reasonable doubt. As I explained in *Muhammad*, "[a]lthough the defendant may have a right to plead guilty, the defendant has no corresponding 'right' after conviction to have the death penalty imposed based on a waiver of the right to present mitigation." 782 So. 2d at 369 (Pariente, J., specially concurring). Further, "it is not necessarily those most deserving of the death penalty . . . who seek its imposition and refuse to present mitigation. Rather, in some cases, those seeking the death penalty, while competent, may suffer from serious underlying mental illnesses." *Id.* In fact, whether a defendant suffers from such mental illness is exactly the type of mitigation that would be appropriately presented by special counsel, as the trial court's sentencing order in this case reflects.

As the United States Supreme Court stated in *Porter v. McCollum*, 558 U.S. 30 (2009), "the Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.' " *Id.* at 42 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)). Likewise, it is clear that a jury not apprised of mitigating evidence cannot properly make all of the requisite findings of fact required to constitutionally impose death—namely, that the aggravation outweighs the mitigation and, further, that death is an appropriate sentence. *See Hurst*, 202 So. 3d at 40-42. In *Hurst*, this Court stated that "[i]f 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." *Id.* at 60. Therefore, the *Hurst* error cannot be harmless beyond a reasonable doubt in a case where mitigating evidence existed but was not presented to the penalty phase jury. *See Kaczmar*, 228 So. 3d at 16-17 (Pariente, J., concurring in part and dissenting in part).

**THIS CASE**

*Hurst* applies retroactively to Grim's sentence of death, which became final in 2003. *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Although the trial court appointed special counsel to present mitigation at the *Spencer* hearing and recognized in its sentencing order that the penalty phase jury did not have the benefit of hearing mitigation, I cannot conclude, in light of *Hurst*, that the lack of mitigation was remedied. The jury in Grim's case was left with no choice but to recommend death because they did not hear any evidence of mitigation. Thus, the jury's unanimous recommendation for death in Grim's case is unreliable and cannot support the conclusion that the *Hurst* error is harmless beyond a reasonable doubt.

## CONCLUSION

For the reasons fully explained above, I cannot conclude that the *Hurst* error was harmless beyond a reasonable doubt and would, therefore, reverse and remand for a new penalty phase.

Accordingly, I dissent.

QUINCE, J., concurs.

An Appeal from the Circuit Court in and for Santa Rosa County,
Ross M. Goodman, Judge - Case No. 571998CF000510XXAXMX

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

# EXHIBIT 2

# Supreme Court of Florida

TUESDAY, MAY 22, 2018

**CASE NO.: SC17-1071**
Lower Tribunal No(s).:
571998CF000510XXAXMX

NORMAN M GRIM vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Clarification is hereby denied.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

BILLY H. NOLAS
LISA HOPKINS
JOHN A. MOLCHAN
HON. DONALD C. SPENCER, CLERK
HON. LINDA LEE NOBLES, CHIEF JUDGE
HON. ROSS GOODMAN, JUDGE

# EXHIBIT 3

# Supreme Court of Florida

WEDNESDAY, JULY 19, 2017

**CASE NO.: SC17-1071**
Lower Tribunal No(s).:
571998CF000510XXAXMX

NORMAN M GRIM vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.

Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by August 8, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of appellee's answer brief.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

BILLY H. NOLAS
HARRY P. BRODY
LISA HOPKINS

# EXHIBIT 4

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT**
**IN AND FOR SANTA ROSA COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**vs.** **Case No.: 1998-CF-510**

**NORMAN GRIM,**

**Defendant.**

_____/



**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF**

**THIS CAUSE** came before the Court upon the Defendant's successive motion for post-conviction relief filed pursuant to rule 3.851, Florida Rules of Criminal Procedure, on June 25, 2016. The Defendant seeks relief based on the United States Supreme Court decision in Hurst v. Florida, 136 S. Ct. 616 (2016). The Defendant further argues, in his November 7, 2016 memorandum of law, that he is entitled to relief based on the Florida Supreme Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). Based on a recent ruling by the Florida Supreme Court, the Court agrees Hurst applies to Grim. Although the instant motion was perhaps premature, the Court has jurisdiction to consider its merits at this juncture. Because of the various circumstances and facts of this case, the Court finds the Hurst error was harmless beyond a reasonable doubt and that an evidentiary hearing is unnecessary.

Background

The Florida Supreme Court has summarized the facts of the case as follows:

> On July 27, 1998, at approximately 5:08 a.m., Deputy Sheriff Timothy Lynch responded to a call from Cynthia Campbell, who complained of a disturbance behind her house. Upon Lynch's arrival, Campbell was standing on her front porch with her next-door neighbor Norman Grim, Jr., who was wearing a pair of cut-off jean shorts. All three walked around the porch to the back of Campbell's house where Lynch noticed a broken

window and a chrome lug nut in the surrounding bushes. Before returning to his house, Grim invited Campbell over for a cup of coffee after Lynch finished his investigation.

Connie Kelley, Campbell's bookkeeper, arrived at Campbell's house at 7:20 a.m., entered the house, called Campbell's name, but did not receive an answer. Kelley became concerned and called the police. Cynthia Magee, Campbell's paralegal, went to Campbell's house later in the morning, saw her car parked in front of the house, and went inside to check. Deputy Sheriffs Calvin Rutherford and Steven McCauley arrived ten to fifteen minutes after Magee.

Rutherford obtained permission from Grim to look inside his home and noted that Grim had no shirt on and that there was a light pink color on one of his shoulders. Neither deputy saw any signs that there had been a struggle in the house.
Corporal Blevin Davis arrived at 11 a.m. and talked briefly with Grim. Davis observed that Grim was wearing a pair of cut-off blue jean shorts with several small reddish brown stains on them; there was another reddish-brown stain on his shoulder. Grim explained that the stains were primer paint from where he had been working on his car. Grim asked for and obtained permission to get his dogs that were now loose in the neighborhood.

Thomas Rodgers, the manager of the north end of the Pensacola Bay fishing bridge, ran a bait and tackle shop and convenience store at the foot of the fishing bridge, and he testified that sometime early in the afternoon of July 27, 1998, Grim came into his store. On the same day, Cynthia Wells, a former coworker of Grim, left work around 1 p.m. and was traveling on the Pensacola Bay bridge where she saw Grim walking beside his parked car with both doors and the trunk open. She testified that he was wearing a light-colored shirt and cut-off blue jean shorts.

In the afternoon of July 27, James Andrews and his son were fishing from the Pensacola Bay bridge. Around 3:30 p.m., Andrews hooked a human body that was wrapped in a sheet, a shower curtain, and masking tape. Law enforcement was called to retrieve the body, which the parties stipulated was Cynthia Campbell. After receiving word that Campbell's body had been found, Detective Donnie Wiggen went to the convenience store where he talked to Rodgers and retrieved a surveillance videotape showing that Grim had entered the store just after 2 p.m.

Law enforcement officers secured Grim's house. Davis drove to the Pensacola Bay fishing bridge and was present when Campbell's body was brought to shore. Davis testified that her body was wrapped in striped sheets, which the police determined belonged to Grim, and black garbage bags. When the bags and sheets were removed at the autopsy, Davis observed that a piece of green carpet was "wrapped up with everything else." Davis recalled having seen a similar piece of green carpet hanging over the rail of Grim's back porch. Thereafter, the police obtained a search warrant for Grim's home and an arrest warrant.

Crime scene analyst Janice Johnson from the Florida Department of Law Enforcement attended Campbell's autopsy conducted by Dr. Michael Berkland, a forensic pathologist.

Johnson testified that under the black garbage bags, the body was wrapped in carpet and sheets. They had to remove "layers of material," including the garbage bags, a floral sheet, a blue striped flat sheet and fitted sheet, a piece of green carpet, masking tape, and rope.

Dr. Berkland testified that Campbell's face was covered with deep abrasions and contusions around both eyes, her forehead, both sides of her chin, and her lips, all of which Dr. Berkland described as blunt force trauma. There was additional blunt force trauma to both shoulders and to the head. These injuries were all consistent with having been inflicted by a hammer. Dr. Berkland testified that Campbell suffered eleven stab wounds to the chest, seven of which penetrated her heart, and were consistent with having been caused by a single-edged weapon like a knife. Dr. Berkland opined that the blows to the head preceded the stabbings to the chest and that Campbell's death was caused by blunt force trauma to the head and multiple stab wounds to the chest.

After attending the autopsy, Janice Johnson went to the victim's home where she found no signs of any struggle. She then went to Grim's home where she found two damp mops in the kitchen that had suspected blood stains. Although the area appeared to have been cleaned, Johnson discovered small areas of blood on the floor of the kitchen and on the cabinets near the floor. Johnson collected a coffee mug from the kitchen counter and two bloody fingerprints on a trash bag box. Inside the kitchen trash can was a striped pillow case that appeared to have blood on it and that had the same pattern as one of the sheets found wrapped around Campbell's body. In the dining room, Johnson collected additional samples of suspected blood from the window frame and from the floor. In the living room, Johnson seized a pair of athletic shoes and a rope which appeared to be consistent with the rope found on the victim's body. Johnson also collected a pair of blue-jean shorts with bloodstains on them.

On the back porch, Johnson found a piece of green carpet draped over the rail which was consistent with the green carpet wrapped around the victim's body. Johnson also found a cooler in which she found a steak knife, a piece of terry cloth with reddish-brown stains on it, a pair of Hanes underwear, a tampon with reddish-brown stains on it, a pair of prescription eyeglasses, a wristwatch with a broken band, masking tape, a blue and white striped pillowcase, a hammer with suspected blood, some cloth tissue, and a Bud Lite beer carton.

Grim was arrested in Oklahoma on July 31, 1998. Detective Davis flew to Oklahoma to pick him up, to retrieve the clothes he had been wearing, and to arrange for the return of Grim's car.

The prescription glasses found in the cooler matched Campbell's prescription records, and the roll of masking tape in the cooler was fracture-matched to the tape found on Campbell's body. The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home. Although the examiner was unable to fracture-match these pieces, he determined that they were identical in appearance, construction, and fiber type and could have originated from the same source.

Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's, and the bloody fingerprints on the trash bag box were identified as Grim's.

DNA analysis of stains on the cut-off jean shorts Grim was wearing when arrested revealed twelve genetic markers consistent with the DNA of Cynthia Campbell, and the steak knife found in Grim's cooler yielded six genetic markers consistent with the victim. The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the box of trash bags. Likewise, stains on a pair of blue-jean shorts and a pair of shoes found in Grim's living room bore genetic markers consistent with those of the victim.

After the presentation of evidence during the guilt phase, **the jury returned a verdict of guilty on the charges of first-degree murder and sexual battery upon a person twelve years of age or older with the use of a deadly weapon.** In light of the fact that Grim continued to insist on waiving his right to present mitigating evidence during the penalty phase, and, in fact, ordered his attorneys not to present any mitigation, the trial court conducted a hearing pursuant to Koon v. Dugger, 619 So.2d 246 (Fla.1993). During the hearing, the trial judge determined that Grim freely, voluntarily, and knowingly entered into his decision to waive mitigation and announced that he would conduct the penalty phase before the jury where Grim still could, if he wished, present mitigating evidence. Afterward, the judge stated that he would conduct a Spencer hearing and order a presentence investigation report and, if necessary, he would also appoint an independent or special counsel to present mitigating evidence to the court outside the presence of the jury.

At the penalty phase, the State introduced certified copies and testimony relative to Grim's prior Florida convictions: (1) unarmed robbery; (2) kidnapping and robbery; (3) armed burglary and aggravated battery; and (4) armed burglary and armed theft. The State's last witness was the victim's mother, Dorothea Campbell, who read a short victim impact statement. **Grim did not present any mitigating evidence, and the jury recommended the death penalty by a vote of twelve to zero.**

At the sentencing hearing, Grim's attorneys were present before the court, along with Spiro Kypreos, special counsel appointed by the trial court to investigate and present mitigation. **Grim insisted on not presenting any mitigation and so instructed his attorneys. Defense counsel confirmed Grim's waiver of mitigation, and the trial court found that Grim, against the advice of his counsel, freely and voluntarily decided not to present mitigating evidence.**

During sentencing, the State presented its sentencing memorandum to the court, along with depositions from the following persons: Grim's mother, stepfather, and sister, a coworker, a supervisor, and psychologist Dr. James Larson. Defense counsel objected to the attachment of Dr. Larson's deposition because it provided mitigation that Grim did not want presented.

> Before there was any presentation of mitigating evidence at the sentencing hearing, defense counsel objected to special counsel Kypreos's presentation, particularly to Dr. Larson's interview with Grim. The trial court denied the objection. Thereafter Kypreos offered in mitigation a presentence report and a psychological report from court proceedings occurring in 1982, a 1983 letter from Grim's public defender in those cases, and a written description of intermittent explosive disorder taken from the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.2000). Kypreos also presented testimony from Grim's sister relative to his family life and childhood and two of Grim's work supervisors regarding his work ethic.
>
> In its written order, the trial court found that the State established three aggravating circumstances beyond a reasonable doubt: (1) the murder was committed by a person under sentence of imprisonment; (2) the defendant had prior convictions for violent felonies; and (3) the murder was committed while the defendant was engaged in the commission of a sexual battery. The trial court found the following statutory mitigating circumstances pursuant to section 921.141(6)(h), Florida Statutes (1997):(1) disruptive home life and child abuse (given significant weight); (2) hard-working employee (given significant weight); and (3) mental health problems that did not reach the level of section 921.141(6)(b), Florida Statutes (1997) (given great weight). The trial court also considered seventeen nonstatutory mitigators. Because many were subsumed within the statutory mitigation and thus already considered, the trial court considered the following remaining nonstatutory mitigators: (1) lack of long-term psychiatric care (no weight); (2) marital problems and situational stresses (great weight); (3) errors of judgment under stress (no additional weight); (4) model prison inmate (some weight); and (5) entered prison at a young age (given little weight). The trial court ordered and adjudicated Grim guilty of first-degree murder and sentenced him to death. The court also found Grim guilty of sexual battery upon a person twelve years of age or older with the use of a deadly weapon and sentenced him to 390.5 months in state prison to run consecutively to the death sentence.

Grim v. State, 841 So. 2d 455, 457–60 (Fla. 2003)(emphasis added)(footnotes omitted).

Hurst v. State

On October 14, 2016, the Florida Supreme Court issued its decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). In that case, the Florida Supreme Court held that before a trial judge may consider imposing a sentence of death, four jury findings must be made. First, the jury in a capital case must unanimously and expressly decide which aggravating factors, if any, were proven beyond a reasonable doubt. Second, the jury must unanimously find that the proven aggravating factors are sufficient to impose death. Third, the jury must unanimously find that the

proven aggravating factors outweigh the combined weight of the mitigating circumstances. Finally, the jury must unanimously recommend a sentence of death. See also Evans v. State, No. SC16-1946 (Fla. Feb. 20, 2017).

Retroactivity of Hurst

On December 22, 2016, the Florida Supreme Court decided that Hurst v. State is retroactive to cases in which a defendant's sentence of death was not final when the United States Supreme Court decided Ring v. Arizona in 2002. The Defendant's sentence was not final until 2003. Grim v. Florida, 124 S.Ct. 230 (Oct. 6, 2003). Therefore, Hurst applies retroactively to Grim's case. The only question is whether the Hurst error is harmless beyond a reasonable doubt.

As the Florida Supreme Court has explained, "not every defendant to whom Hurst applies will ultimately receive relief." Rather, "each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase." Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Having thoroughly reviewed the record, the Court concludes that the Hurst error in this case was harmless beyond a reasonable doubt.[1]

[1] The Court finds the State's argument that a Hurst claim should be raised in the Florida Supreme Court in a habeas petition, not in the trial court in a 3.851 motion, to be without merit. The Defendant's claim is properly addressed in a rule 3.851 motion, which allows for claims based on a fundamental constitutional right that was not established within the general time limitation of rule 3.851 and that has been held to apply retroactively. The concept of harmless error is commonly addressed in appeals, true, but it is *also* a standard applied by post-conviction courts in addressing certain constitutional claims. For example, harmless error is the same standard a trial court applies when a Giglio violation is proven in a post-conviction context. See Guzman v. State, 868 So. 2d 498, 507-508 (Fla. 2003)("If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt" and finding "the **postconviction court's** resolution of the Giglio claim does not sufficiently reflect the standard appropriate to a Giglio claim.")(emphasis added).

Defendant's Willingness to Waive a Penalty Phase Jury

> A defendant may waive the advisory jury in the penalty phase of a capital case, provided the waiver is voluntary and intelligent. E.g., Valle v. Moore, 837 So.2d 905, 908 (Fla.2002). However, "even when a capital defendant makes a voluntary and intelligent waiver of the advisory jury's recommendation, the trial judge 'may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such an advisory jury recommendation.' " Muhammad v. State, 782 So.2d 343, 361 (Fla.2001) (quoting State v. Carr, 336 So.2d 358, 359 (Fla.1976)). The record confirms that Rollo was uncertain as to whether the jury recommendation could be waived. Nonetheless, it is unnecessary to address Strickland's performance prong because this claim fails the prejudice prong. See Jones, 928 So.2d at 1189.
>
> First, the trial judge expressly and unequivocally informed Grim of his right to waive the jury advisory sentencing. **Second, Grim himself indicated on the record that *he did not care* whether the court obtained a jury recommendation**, and the sentencing order confirms as much: "**The Defendant made it clear he would waive presentation before a jury as provided in section 921.141(1). He left the decision of whether to obtain an advisory sentence to the Court, but was adamant that no mitigation be presented or argued.**" Third, the sentencing order states that "**had the Defendant sought to waive the jury recommendation, this Court probably would have exercised its discretion and rejected the waiver.**"

Grim v. State, 971 So. 2d 85, 101-102 (Fla. 2007)(emphasis added).

Because of the Defendant's stated attitude regarding the jury recommendation,[2] the circumstances here do not present a strong case that the Defendant's Sixth Amendment rights were violated by a Hurst error. Nevertheless, although the Defendant was agreeable to foregoing a jury recommendation, a jury did in fact consider what sentence should be imposed in this case. Attachment 8; Cf., Mullens v. State, 197 So. 3d 16 (Fla. 2016). Thus, the Court has fully analyzed whether the Hurst error was harmless beyond a reasonable doubt.

Hurst Error Harmless as to Existence of Aggravating Factors

The Court found three aggravating factors in this case. (1) Murder by a person under sentence of imprisonment. Specifically, at the time of Campbell's murder, the Defendant was on parole from a sentence imposed in Texas. See Peek v. State, 395 So. 2d 492, 499 (Fla.

[2] See Attachment 6, at 819.

1981)(finding that the phrase "person under sentence of imprisonment" includes persons who are under a sentence for a term of years and who have been placed on parole.) (2) The Defendant had prior convictions for violent felonies at the time he murdered Campbell. (3) The Defendant murdered Campbell while he was engaged in the commission of a sexual battery against Campbell.

The fact that the Defendant was on parole at the time of the sexual battery and murder was not specifically found by the jury, but no reasonable jury would have concluded otherwise. The Defendant's status as a parolee at the time of the murder cannot be seriously disputed. The records showing the Defendant's status as a parolee were admitted at trial. Attachment 7, at 888-891; Attachment 11, at 3. The lack of a specific jury finding as to this aggravator was harmless.

The fact that the jury did not make any findings regarding the Defendants' prior convictions is not a violation of the Sixth Amendment.[3] Again, the Defendant's prior convictions are a matter of public record. Attachment 7, at 874-875; Attachment 11, at 4-5. No reasonable jury could conclude that the fact of the Defendant's prior convictions was not demonstrated beyond a reasonable doubt.[4]

As for the finding that the Defendant murdered Campbell while he was engaged in the commission of a sexual battery against Campbell, the Defendant can make no legitimate claim of Hurst error. During the guilt phase, the jury **unanimously** found that the "Defendant is guilty of

[3] **"Other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)(emphasis added).

[4] In fact, the Defendant's claim of prejudice from the Hurst error derives from a recognition that these two aggravators exist. The Defendant argues that evidence could be presented that would lessen the *weight* of these aggravating factors, which is a tacit recognition that the aggravating factors would have been found by the jury. The Defendant has not advanced any claim that there is a reasonable doubt as to the fact of Defendant's prior convictions and the Defendant's status as a parolee at the time of the murder.

Sexual Battery Upon a Person Twelve (12) Years of Age or Older With the Use of a Deadly Weapon or Great Physical Force." Attachment 1; Attachment 3; Attachment 7, at 899; Attachment 11, at 5-6. Here, the aggravating factor was found by the jury in the guilt phase of the trial.[5] Thus, there can be no reasonable doubt the jury would have so found during the penalty phase.

Hurst Error Harmless Due to Jury's Unanimous Recommendation of Death

The Florida Supreme Court held in Hurst that before a circuit judge may impose a death sentence, the jury must unanimously recommend the Defendant be sentenced to death. In this case, all twelve jurors agreed[6] (even though they were instructed that they did not have to be unanimous[7]) that the Defendant should be sentenced to death. In the cases in which the Florida Supreme Court has held Hurst error to be harmless, it has been in cases in which the jury's recommendation of death has been unanimous. "We initially must emphasize the unanimous jury recommendation of death in this case." Hall v. State, SC15-1662, 2017 WL 526509, at *22 (Fla. Feb. 9, 2017)(finding Hurst error harmless); cf., Dubose v. State, 210 So. 3d 641 (Fla. 2017)("We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless.")

[5] As Justice Scalia noted in Ring v. Arizona, "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, **more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.**" Ring v. Arizona, 536 U.S. 584, 612–13 (2002)(Scalia, J., concurring)(emphasis added).

[6] Attachment 8.

[7] Attachment 7, at 906.

Hurst Error Harmless Due to Defendant's Total Opposition to Mitigation Being Presented to Jury

The primary issue in Grim's case is how a jury would have *weighed* the aggravating factors had he been afforded the protections of Hurst, not whether they would have been found to exist at all. The Defendant, through counsel, skillfully argues how a jury could have been presented evidence that would lessen the weight a jury would likely assign to the prior conviction aggravator and serving a sentence of imprisonment aggravator.

The difficulty with this argument is that the record clearly shows the Defendant adamantly opposed *any* mitigating evidence being submitted to the jury. Attachments 4, 5, 6, 7, 9, 10, 11, 13 and 14.

As a federal court explained regarding the Defendant's case:

> The record supports the state court's determination that Petitioner waived his right to present mitigating evidence after having been fully advised of his rights. During the Koon hearing, Petitioner orally and in writing explicitly waived the presentation of a mitigation case.
>
> The trial court then explained the penalty phase procedures, and Petitioner repeatedly affirmed that he understood the aggravating and mitigating circumstances and wanted to waive a mitigation case:
>
> > [Court]: And you understand that in that mitigation you could call any witnesses that you want to from psychologists, psychiatrists, former employers or whatever to present anything that you want, to try to offset the imposition of the death penalty. Do you understand that?
> >
> > [Grim]: Yes, I understand.
> >
> > [Court]: And you have discussed that with both of your attorneys, the right to call any and all family members that would speak about you and your life and your background and anything that would be favorable to the jury in making its decision. You discussed that with your attorneys?
> >
> > [Grim]: Yes.

[Court]: And you understand that because of the presentation of this information, I don't know what the aggravators are in the case, and you discussed the potential aggravators with your attorneys?

[Grim]: Yes, I have.

[Court]: By the presentation of this evidence, that the jury could very well, even if you were found guilty of murder as charged, could find that mitigation outweighs the aggravating and recommends [sic] life. Do you understand that?

[Grim]: Yes, sir.

[Court]: Even if they were to recommend death, I could do a separate proceeding and say, no, that's not appropriate in this case, and life is appropriate. Did you understand that?

[Grim]: Yes.

[Court]: Have you had plenty of time to discuss this with both of your attorneys?

[Grim]: Yes.

[Court]: And are you satisfied with them and their services?

[Grim]: Yes, I am.

[Court]: Have they been out to the jail and discussed with you your case and all the evidence as Mr. Hill suggested?

[Grim]: Yes, they have.

[Court]: Have they—is there anyone that they haven't talked to or anyone that you think is necessary to prepare for this case?

[Grim]: No, sir.

**[Court]: It is your decision and your decision alone to instruct your lawyers not to call family members, other employers, not to present mitigation evidence if you are found guilty?**

**[Grim]: Yes, it is.**

**[Court]: And is it still your desire to waive the presentation of mitigation evidence to the jury if they find you guilty of first degree premeditating [sic] or felony murder?**

**[Grim]: Yes, it is.**

Grim v. Buss, 3:08CV2 MCR, 2011 WL 1299930, at *43–44 (N.D. Fla. Mar. 31, 2011)(emphasis added); See Attachment 5, at 27-29.

In fact, the record conclusively shows that the Defendant instructed his counsel not to put on any mitigating evidence. In Schriro v. Landrigan, 550 U.S. 465, 475 (2007), the Supreme Court stated that "If Landrigan issued such an instruction [to "his counsel not to offer any mitigating evidence"] counsel's failure to investigate could not have been prejudicial under Strickland."

> [T]he Schriro rule follows naturally from Strickland's formulation of the prejudice prong, for there cannot be a reasonable probability of a different result if the defendant would have refused to permit the introduction of mitigation evidence in any event.
>
> Allen v. Sec'y, Florida Dept. of Corr., 611 F. 3d 740, 762 (11th Cir. 2010) cert. denied, 131 S. Ct. 2898 (U.S. 2011)(citations omitted).

Similarly, if the Defendant would not permit the introduction of mitigation evidence, it is difficult to imagine how the jury's unanimous recommendation would be different if the Defendant had the protections of Hurst. In other words, the Defendant's claim of harmful error is based on the jury hearing mitigating evidence, but such mitigating evidence never would have been heard by a jury given the Defendant's consistent and unwavering opposition to it.

Michael Rollo, the Defendant's counsel for the penalty phase of this trial, testified at an evidentiary hearing on a prior post-conviction motion. Mr. Rollo explained, "In first consultation with Mr. Grim and in every consultation thereafter he reconfirmed, reiterated that that was his express desire not to seek any mitigation." Attachment 14, at 11. Mr. Rollo described himself as "the gagged and bound penalty phase guy." Id. at 15. Rollo further testified, "If a person who has told you directly that he don't want any mitigation presented because... [he had] issues about not wanting to live the rest of his natural life in that situation,

that would have been my reasoning [for not investigating Defendant's behavior while incarcerated both in Texas and Florida and in the Santa Rosa County Jail]." Id. at 21-22.

Sentencing Judge Heard Evidence of Mitigation over Defendant's Objection

The Florida Supreme Court's opinion in Kaczmar v. State, No. SC13-2247 (Fla. Jan. 31, 2017), in which Hurst error was found to be harmless, is particularly instructive here. As the Florida Supreme Court noted in that opinion, "The sentencing order here is similar to the one in Grim v. State, 841 So. 2d 455 (Fla. 2003)." The Florida Supreme Court stated, citing Grim, "[we] conclude that the trial court properly sentenced Kaczmar notwithstanding the lack of mitigation presented for the jury's consideration." Kaczmar v. State, SC13-2247, 2017 WL 410214, at *6 (Fla. Jan. 31, 2017); see Attachments 9, 10 and 11.

Justice Pariente noted that the lack of mitigating evidence presented to the jury is somewhat problematic for Hurst harmless error review. Kaczmar, at *11. ("Nor can we speculate on the effect that the additional mitigation, *if presented to the jury*, would have had on the jury's recommendation in Kaczmar's penalty phase.")(Pariente, J., dissenting in part)(emphasis added). By the same token, if a defendant does not wish for a jury to hear any mitigating evidence whatsoever, as in this case, the effect of such potential mitigating evidence is immaterial because the jury would never hear it.

In any event, the majority opinion in Kaczmar is consistent with a conclusion that the Hurst error is harmless in this case. The Defendant was willing to waive the entirety of the penalty proceeding. For purposes of harmless error analysis, a key factor is that the Defendant in this case consistently and steadfastly opposed any mitigation evidence being presented to the jury. Thus, to conclude the Hurst error was harmful based on the possibility that the Defendant would have been willing to allow for mitigation to be presented to the jury had the protections of

Hurst been provided is pure speculation without any asserted factual basis to support it. Indeed, "a reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt." Fla. Std. Jury Instr. (Crim.) 3.7.

Conclusion

In summary, the Court concludes (1) no reasonable jury would have failed to find two of the three aggravating factors at issue and the third aggravating factor was in fact found to exist by the jury due to the Defendant's conviction for sexual battery, (2) the jury in the Defendant's penalty phase unanimously recommended the Defendant be sentenced to death, (3) the Defendant's total waiver of any mitigating evidence being presented to a jury eliminates any reasonable possibility that Hurst error undermines the jury's unanimous recommendation of death, and (4) the Circuit Judge who imposed sentence, who also heard mitigating evidence over the Defendant's objection, found that "the three aggravating factors established significantly outweigh all of the mitigation in the case." The Court finds that Hurst error in this case was harmless beyond a reasonable doubt. Attachment 11; See Davis v. State, 207 So. 3d 142 (Fla. 2016).

Accordingly, it is **ORDERED and ADJUDGED** that the Defendant's Successive Motion for Post-Conviction Relief is hereby **DENIED**. The Defendant has the right to appeal within thirty (30) days of the rendition of this order.

**DONE and ORDERED** in Chambers in Milton, Santa Rosa County, Florida on this 8th day of May, 2017.

**ROSS M. GOODMAN**
**Circuit Judge**

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and accurate copy of the foregoing order has been furnished via regular U.S. Mail (*unless otherwise indicated*) to:

✓Norman Grim, DC # 282008
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026-4000

✓Billy Nolas
Assistant Federal Public Defender
(*via electronic service*)

✓Harry Brody, Esq.
(*via electronic service*)

✓John Molchan
Assistant State Attorney
(*via electronic service*)

✓Berdene Beckles
Assistant Attorney General
(*via electronic service*)

this 9th day of May, 2017.

✓Clerk

**DONALD C. SPENCER, Clerk of Court**

BY: Cathy Wilkerson
Deputy Clerk

# EXHIBIT 5

**No. SC17-1071**

IN THE

# Supreme Court of Florida

NORMAN M. GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**APPELLANT'S BRIEF IN RESPONSE TO JULY 19 ORDER TO SHOW CAUSE**

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## INTRODUCTION

This appeal seeks review of the circuit court's failure to hold an evidentiary hearing and denial of Appellant Norman Grim's claim for relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), based on the "harmless error" doctrine. Here, unlike in any other case this Court has assessed for harmless error, Appellant requested a hearing in the circuit court based on a substantial evidentiary proffer showing the harmfulness of the *Hurst* error. This Court's long-established precedent encourages circuit-court hearings to establish the impact of constitutional errors like *Hurst* in capital sentencing proceedings. In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless, and this Court should remand for a hearing.

Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless. Appellant's proffer included declarations from multiple sources—prior counsel, a psychological expert, and multiple witnesses—that undermine the sufficiency and weight of the aggravating circumstances that went unchallenged by defense counsel at his penalty phase, and would have provided the jury with reasons to vote for life. Based on his proffer, Appellant could establish at a hearing that (1) the aggravators were not challenged by his penalty-phase counsel because of a pre-*Hurst* practice followed by counsel here and other lawyers at the time; (2) in a constitutional proceeding without *Hurst*

error, Appellant's counsel would have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different.

Further, even if this Court does not remand for a hearing, the circuit court's harmless-error ruling should not be affirmed and Appellant should be granted relief because the State cannot establish harmless error on the present record.

## REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents important issues of first impression regarding the need for evidentiary development in the harmless-error analysis of *Hurst* claims. Appellant respectfully requests the opportunity for his counsel to present oral argument on this and related issues pursuant to Fla. R. App. P. 9.320, and also requests that the Court allow him the opportunity to brief this case in accord with the normal, untruncated rules of appellate practice.

## BACKGROUND

In 1998, Appellant was convicted of murder in the Circuit Court of the First Judicial Circuit, Santa Rosa County. *Grim v. State*, 841 So. 2d 455 (Fla. 2003). At the conclusion of the penalty phase, the jury returned a unanimous generalized recommendation to impose the death penalty. The court, not the jury, then made the findings of fact required to impose a sentence of death under Florida law. The court,

not the jury, found beyond a reasonable doubt that three aggravating circumstances had been established,[1] those aggravators were "sufficient" to impose the death penalty, and the aggravators were not outweighed by the mitigation.[2] Based upon this fact-finding, the court sentenced Appellant to death.

On direct appeal, Appellant argued that Florida's capital-sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). *Grim*, 841 So. 2d at 465. Relying on now overruled precedent, this Court rejected that argument and affirmed Appellant's conviction and sentence. Appellant's death sentence became final in 2003, when his petition for a writ of certiorari was denied by the United States Supreme Court. *See Grim v. Florida*, 540 U.S. 892 (2003).

Appellant continued to challenge the constitutionality of Florida's capital-sentencing scheme under *Ring* in his initial state post-conviction proceedings, but was unsuccessful. *See Grim v. State*, 971 So.2d 85, 102-03 (Fla. 2007).

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[1] The three aggravators the judge found were that Appellant (1) was under sentence of imprisonment, (2) had prior convictions for violent felonies, and (3) committed the offense while engaged in a sexual battery.

[2] Although Appellant did not want his attorney to present mitigation, the court appointed special counsel to present mitigation to the court during a *Spencer* hearing. The mitigation the court found included that Appellant (1) experienced a disruptive home life and child abuse, (2) was a hard-working employee, (3) had mental health problems (4) suffered from a lack of long-term psychiatric care, (5) had marital problems and situational stress, (6) made errors of judgment under stress, (7) was model prison inmate, and (8) entered prison at a young age.

In June 2016, Appellant filed a motion under Fla. R. Crim. P. 3.851, seeking relief under *Hurst v. Florida*. The State filed a response, and Appellant filed a reply. After this Court issued its decision in *Hurst v. State*, the parties filed memoranda of law addressing both *Hurst v. Florida* and *Hurst v. State*.

Appellant argued that notwithstanding his jury's unanimous recommendation to impose the death penalty, an evidentiary hearing was necessary on the issue of harmless error to establish how defense counsel's approach to diminishing the aggravating factors would have been different without the *Hurst* error. Appellant's Mem. at 20-40. Appellant proffered substantial evidence in support of his hearing request, describing and attaching records and declarations from prior counsel, a psychological expert, and witnesses, showing the reasonable probability that (1) defense counsel's approach to diminishing the weight of the aggravation would have been different had counsel known that the jury, not the judge, would make the required findings of fact, and (2) there would have been a different sentencing result.

The circuit court denied relief without addressing Appellant's proffer or request for a hearing on the dispositive issue of harmless error. The court acknowledged that *Hurst* was retroactive to Appellant under this Court's decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), but ruled that the *Hurst* error in his case was harmless and denied relief on the grounds that (1) Appellant's prior violent felony aggravators remove Appellant from the protections afforded by *Hurst*; (2) the

advisory jury's recommendation was unanimous; and (3) Appellant instructed his attorney not to present mitigation.

This Court directed the parties to file briefs addressing why the circuit court's order should not be affirmed based on this Court's precedent in *Hurst v. State*, *Mosley*, and *Davis v. State*, 207 So. 3d 142 (Fla. 2016).[3]

## ARGUMENT

### I. This Court should remand for a hearing on harmless error based on Appellant's evidentiary proffer in the circuit court, which was sufficient under this Court's precedent to afford him the opportunity to present evidence and testimony establishing the harmfulness of the *Hurst* error

#### A. The circuit court correctly found that the only issue in this case is harmless error, and that *Mullens* "waiver" analysis does not apply

The circuit court was correct that the only issue in this case is whether the *Hurst* error in Appellant's sentencing was harmless beyond a reasonable doubt. Order at 6 ("The only question is whether the *Hurst* error is harmless beyond a reasonable doubt."). As the circuit court recognized, the *Hurst* decisions apply retroactively to Appellant under Florida law because his death sentence became final in 2003, after *Ring*. *See Mosley*, 209 So. 3d at 1283.[4]

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[3] Appellant has provided a condensed brief here per this Court's July 19, 2017 order, but requests the opportunity to provide a standard initial brief, consistent with Fla. R. App. P. 9.210, so that he can fully present all of his issues on appeal.

[4] In addition, as Appellant argued in the circuit court, the *Hurst* decisions are retroactive as a matter of federal law. *See* Defendant's Memorandum of Law at 12-13 (filed Nov. 11, 2016) (discussing federal cases, including *Montgomery v.*

The circuit court was also correct that although Appellant instructed his counsel not to present mitigation, this does not foreclose *Hurst* relief under this Court's "waiver" cases, such as *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In *Mullens*, this Court held that waiver of an advisory jury recommendation may foreclose *Hurst* relief under certain circumstances. Here, though, as the circuit court recognized, this is not a "waiver" case within the meaning of *Mullens* because Appellant did not waive a jury recommendation and "a jury did in fact consider what sentence should be imposed in this case." Order at 7. Accordingly, as the circuit court recognized, harmless error in this case must be "fully analyzed." *Id.*

### B. Under this Court's precedent, Appellant should have been afforded an evidentiary hearing on harmless error after proffering evidence showing the harmfulness of the *Hurst* error with respect to the effect on defense counsel's challenges to the aggravation

Although this Court has found *Hurst* errors harmless in some cases without further evidentiary development, the Court has never made such a ruling when a defendant has proffered harmless-error evidence and is denied a hearing. Here, Appellant requested a hearing in the circuit court based on a substantial evidentiary proffer showing the harmfulness of the *Hurst* error on his sentencing. Appellant's proffer cast real doubt on whether the outcome of his penalty phase would have been

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*Louisiana*, 136 S. Ct. 718, 731-32 (2016) (holding that federal law requires states to make substantive rules retroactive on collateral review)).

the same without the *Hurst* error, particularly in light of the unconstitutional statute's effect on defense counsel's approach to challenging the aggravation.[5] In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless. This Court should remand for such a hearing.

As a general matter, this Court has explained that Florida defendants should be granted evidentiary hearings. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). A circuit court should only find a defendant's presumption of entitlement to an evidentiary hearing overcome if the motion is legally insufficient or the alleged facts and claims are conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). A circuit court's decision to grant an evidentiary hearing on a Rule 3.851 motion is tantamount to a pure question of law, and thus subject to de novo review. *Long v. State*, 183 So.3d 342, 344 (Fla. 2016). When reviewing the record, this Court does not look beyond the filings submitted before the circuit court and all allegations made by the defendant must be accepted as true unless they are "conclusively refuted by the record." *Ventura*, 2 So. 3d at 197-98.

[5] In positing that counsel's approach to the penalty phase would have been different without the *Hurst* error, Appellant is not arguing a claim that counsel was ineffective at the unconstitutional proceeding, but instead that counsel's approach would have been different had Florida required, as the *Hurst* decisions now require, a unanimous jury, not the judge, to make the findings of fact required for a death sentence. *See infra*, discussing cases.

And this Court's precedent makes clear that the effect of an unconstitutional death penalty statute on defense counsel must be considered as part of a harmless error analysis. That is how this Court proceeded after the United States Supreme Court held that a capital jury must be allowed to consider non-statutory mitigating circumstances in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In response to arguments from the State that *Hitchcock* errors were harmless, this Court did not confine the inquiry to the original record. Instead, it permitted defendants who proffered evidence of the harmfulness of the constitutional error the opportunity to present and develop that evidence at a hearing.

There are several examples. In *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the defendant proffered evidence of how Florida's pre-*Hitchcock* capital scheme affected his penalty-phase counsel. This Court found that the proffer warranted a hearing in the circuit court, observing that the evidence was "sufficient to negate the conclusion that the *Hitchcock* error was harmless" and ruling that "the merits of [Meeks'] claims can only be determined by an evidentiary hearing." *Id*. In *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), this Court granted relief on the basis of the extra record proffer concerning the effect of the constitutional error on defense counsel, even though the Court had found the error harmless on the basis of the original record alone. *Compare id.* (granting relief based upon the extra record evidence), *with Hall v. Dugger*, 531 So. 2d 76, 77 (Fla. 1988) (denying relief based

on the original record); *see also Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995) (considering impact of penalty-phase evidence that could have been presented and granting relief due to the effect of the unconstitutional error on defense counsel).

This Court has made clear that *Hurst* claims require individualized harmless error review, and that the burden is on the State to prove that the error did not impact the death sentence. *Id.* at 67-68. The Court has also emphasized that the "State bears an extremely heavy burden" in this context, *id.* at 68, and that meeting that burden will be "rare." *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

Appellant proffered evidence in the circuit court regarding the adverse effect of a constitutional error on defense counsel, and under this Court's precedent, he should be granted the same opportunity to present his evidence at a hearing. Without a hearing, the circuit court could not reasonably conclude that there is "no reasonable probability that the [*Hurst*] error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68. The circuit court should have at least addressed Appellant's proffer and explained whether an evidentiary hearing was necessary.

### C. Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless due to the effect of the unconstitutional statute on defense counsel's approach to the aggravation

Appellant proffered substantial evidence in the circuit court, and would establish at a hearing on the harmfulness of the *Hurst* error, that (1) the aggravators were not challenged by his penalty-phase counsel because of counsel's practice, a

practice followed by Florida lawyers at that time; (2) in a constitutional proceeding without *Hurst* error, Appellant's counsel could have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different.

The State sought to establish the following aggravators: Appellant was (1) previously convicted of a felony and under a sentence of imprisonment, and (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. The State introduced prior convictions in Escambia and Duval Counties and Bell County, Texas. Because of his pre-*Hurst* approach, counsel did not present evidence challenging those aggravating factors, and did not raise any objection when the State introduced evidence to establish the factors.

The proffered evidence below, which is also attached to this brief, highlights that the State cannot establish that the *Hurst* error in Appellant's case was harmless beyond a reasonable doubt.

**1. Declarations of prior counsel**

Appellant proffered declarations from prior counsel who represented him on previous felony charges that were used by the State as aggravation in his penalty phase. *See* Exhibits 1-2. Michael Van Cavage was counsel for Appellant in 1983, when Appellant was convicted in Escambia County of robbery, burglary,

kidnapping, and weapons offenses. John Bigham is a retired lawyer who formerly practiced criminal defense in the State of Texas. In 1991, Mr. Bigham was appointed to represent Appellant on a burglary charge in Bell County, Texas.

Michael Rollo, Appellant's counsel for his capital trial in Florida, did not contact either lawyer before or during the penalty phase. Had Mr. Rollo contacted either, both would have provided information concerning Appellant's prior convictions that would have been relevant to diminishing the weight of the prior-felony/parole status aggravating factors or other aggravators alleged by the State.

For instance, before trial on the 1982 offenses, Mr. Van Cavage moved for the appointment of two psychiatric experts to evaluate Appellant's competency and his mental state. In his motion, Mr. Van Cavage stated that he had reason to believe that Appellant may have been incompetent at the time of the offense and incompetent to assist counsel. The court agreed to appoint the State's expert, Dr. B.R. Ogburn, M.D., to conduct a psychiatric evaluation of Appellant.

Dr. Ogburn examined Appellant on three separate occasions, reviewed court documents, and interviewed Mark Bowden, a friend of Appellant's who was with him on the evening prior to the 1982 offenses. Dr. Ogburn concluded that, on the night of the crimes, Appellant was intoxicated and succumbed to loss of control stemming from a woman turning him down for another man. Dr. Ogburn further concluded that Appellant's crimes were not planned or premeditated, but the result

of emotional "triggering" that had occurred on the previous night. Dr. Ogburn concluded that Appellant was unable to form specific intent for the 1982 crimes.

Prior to Appellant's sentencing in 1983, Mr. Van Cavage presented arguments to the court seeking leniency in addition to psychiatric care during incarceration. In a motion to mitigate, in which Mr. Van Cavage argued that Appellant should not spend the majority of his adult years in prison, Mr. Van Cavage referenced Dr. Ogburn's report and stated that Appellant could function and work as a productive member of society if he was provided with adequate psychiatric care. Mr. Van Cavage also noted that, during his pretrial detention in the Escambia County jail, Appellant did not have any problems with jail officials and had exhibited the ability to function properly within the jail system.

Additionally, Mr. Bigham would have relayed that Appellant's plea-negotiated 20-year sentence of imprisonment more reflected the fact that he had a prior felony, rather than the seriousness of the Texas burglary. In Mr. Bigham's experience as a criminal defense attorney in Bell County, Texas, a first-time offender likely would have been charged with second-degree burglary and been permitted to plead to a lesser charge and receive probation. However, because Appellant had a prior felony record, he likely would have been tried for a first-degree felony with a possible sentence of up to 99 years had he decided to plead not guilty. By entering into a plea agreement, Appellant was permitted to plead guilty to a second-degree

felony with a recommended sentence of 20 years. In Mr. Bigham's experience, the State would not have accepted a reduction in the burglary charge if prosecutors felt that the offense itself was too serious to reduce to second-degree burglary.

**2. Declaration of psychological expert**

Appellant also proffered a declaration by Dr. Jethro Toomer, Ph.D., setting forth the following. *See* Exhibit 3. Dr. Toomer is a licensed psychologist. His practice includes clinical and forensic psychology. He has been qualified by federal and state courts in several jurisdictions to testify about psychological questions arising in capital cases and other forensic issues. He has served as an expert witness in capital cases for over four decades. He also serves as a professor of psychology. Dr. Toomer provided a declaration to undersigned counsel setting forth his opinion regarding the nature, weight, and significance of Appellant's aggravating circumstance arising from his prior convictions.

Dr. Toomer's review of the witness statements, in combination with the records relating to Appellant's convictions, revealed that Appellant has deep-seeded psychological and substance abuse problems. Witnesses who knew Appellant around the time of his prior offenses related that, when Appellant was drinking, he lost control and engaged in acts that he never would have engaged in while sober. When he was drunk, Appellant's friends described him as a different person. One

of the victims of his prior crimes, Nona Young, described Appellant as "a mess, didn't look right and his eyes were strange."

Dr. Toomer's review of the records of Appellant's prior offenses also shed light on the psychological and substance-abuse issues underlying his prior convictions. For example, Mr. Van Cavage moved for the appointment of psychiatric experts to evaluate Appellant's mental state at the time of the crimes. Dr. Ogburn, concluded that on the night of the 1982 offenses, Appellant was intoxicated and succumbed to a loss of control. After Appellant pleaded guilty, Mr. Van Cavage filed a motion to mitigate and wrote a letter to the judge, stating that Appellant's drinking and psychological issues may have been a contributing factor in his crimes, and recommended that Appellant receive counseling. Dr. Toomer or a similarly qualified expert could express the opinion at a hearing that the nature, weight, and significance of the priors, under all relevant circumstances, is not substantial or especially weighty in a capital sentencing context.

**3. Declarations of witnesses**

Appellant also proffered declarations from multiple witnesses, none of whom were ever contacted by Mr. Rollo. Had they been, they would have been willing to provide the following information relevant to challenging aggravation.

Mark Bowden was with Appellant the night before and the morning of his September 1982 arrest for kidnapping and other charges. *See* Exhibit 4. Bowden

had been out drinking hard liquor with Appellant late at night and into the morning for three days straight. Appellant was very drunk. Bowden could tell based upon Appellant's conversation and bizarre behavior that he was not straight or doing well. In the early morning, at a bottle club, Appellant attempted to pick up a woman. When she left with another man, Appellant got unusually upset. Bowden had never seen Appellant so upset about a girl. It did not make sense to Bowden. Appellant's behavior was totally bizarre; he was not making any sense. Bowden believes that there is no way that Appellant would have tried to abduct anyone if not for being "so crazy drunk and not in his right mind." As far as Bowden knows, every time that Appellant has been arrested it has involved alcohol. All of Appellant's poor decisions seem to Bowden to have been alcohol related.

Ronald Horton met Appellant when they worked together on a job in Pensacola, Florida in the 1990s. *See* Exhibit 5. After about four or five months of working together, Horton and Appellant were offered a job in Texas. Horton remembers Appellant as a quiet guy at work. Appellant worked alone and kept to himself. But all that changed when Appellant was drinking. Appellant drank Busch beer by the case, and afterwards he would drink rum and Cokes and smoke marijuana. Appellant was an alcoholic with a serious drinking problem that he could not control. Immediately after Horton and Appellant arrived in Texas on Christmas Eve of 1990, they went out to a bar. They had been drinking and smoking marijuana

at the motel. It was a "serious drinking night," and Appellant was drunk by the time he started playing pool at the bar. Appellant and Horton left in Horton's car, which had a bad front tire. On the way back, they spotted a car that Horton believed had the same size tires as his car, and Horton decided to steal the tires. He and Appellant pulled into the parking lot of an auto shop. The next thing Horton knew, he and Appellant were stealing tools from the garage. It was totally unplanned, according to Horton. It was just "stupid, drunken behavior by both of us." The next morning, Horton and Appellant awoke surprised at what they had done. They would not have stolen the tools if they had not been drunk. They were both arrested for burglary. Horton was sentenced to three years. Horton feels sorry for Appellant. "He was a bad drunk, and he couldn't handle it well," according to Horton. "He got into a bad situation he never would have gotten into if he had not been drinking so much."

Multiple codefendants, including Kathy Smith, Charlotte May, and Charles Raab, all provided declarations regarding the 1981 convenience store robbery in Duval county, Florida. *See* Exhibits 6, 7, 8. All stated that they would have been willing to testify, and would have explained that the 1981 robbery "was the stupid and immature behavior of young people under the influence." In September 1981, Raab was dating Sharon Clough. Sharon was friends with Charlotte and Kathy. Immediately preceding the robbery, the five of them started binge drinking and did not stop until they left Florida and were arrested in Maine. "We drank and kept

drinking for about four weeks straight." Raab and Appellant quickly spent the $1,000 they had on alcohol. They were drinking hard. Appellant was drinking beer by the case and whiskey by the bottle. When he was awake, Appellant was drinking until he passed out. When he woke up, he started drinking again. Appellant drank more in that three-to-four week time span than most drinkers would consume in a year. Raab is surprised Appellant did not die from alcohol poisoning. Before the robbery, they were drinking and smoking marijuana daily. On the night of the robbery, Charlotte, Sharon, Appellant, and Raab were drinking, and it was clear they were using other drugs. Smith could tell they were all intoxicated. Smith believes that, if not for the substance abuse, the robbery would not have happened. "We were just stupid kids who made a rash decision. We took beer and cigarettes from the store. There were no guns used." According to Smith, Sharon Clough was the mastermind behind everything the group did. May feels that the "robbery itself was stupid and immature. We were just dumb kids who made a very poor decision." The robbery took place at a convenience store across the street from the trailer park where Sharon lived. There were no guns. "Basically we just walked into the store and took money and beer. It was a drunk prank by stupid kids more than a robbery." According to May, Sharon Clough was the catalyst for everything the group did.

Victoria McKee lived in Escambia County, Florida in September 1982. Appellant was charged with burglary and aggravated battery as a result of him

breaking into McKee's residence. *See* Exhibit 9. McKee recalls that Appellant pleaded guilty to that offense. McKee is against the death penalty. If asked, she would have been against the death penalty for Appellant in 1998, especially in light of Appellant's mental health issues. If contacted by defense counsel, McKee would have provided this information. McKee does not wish to see Appellant executed.

Nona Young lived in Pensacola, Florida in September 1982. *See* Exhibit 10. She worked as a radio personality and also for the WRSE television station. Appellant was charged with attempting to kidnap her. Young recalls Appellant's disheveled state during the crime: "I recall that he was wearing nothing but shorts and his hair was windblown. He was a mess, didn't look right and his eyes were strange." She is aware of the bizarre circumstances surrounding the other crimes he committed that day. Appellant's crimes did not appear planned to Young. She attended his sentencing. She recalls that the judge ordered psychiatric treatment. In 1998, Young was working in a news room in Mobile, Alabama and was there when the story broke that the police were looking for Appellant in connection with a murder. At some point in the following year, Young was contacted by a prosecutor, who told Young that Florida was seeking the death penalty for Appellant. Young was asked her opinion on the death penalty and if she was willing to testify for the State. Young told the prosecutor that she did not want any part in assisting in Appellant being sentenced to death. Young did not hear from the prosecutor again.

Young did not wish for Appellant to be sentenced to death in 1998 and she does not wish him to be on death row now. Young was never contacted by Appellant's trial counsel. If she had been contacted, she would have provided the above information.

#### 4. Records

In addition to the affidavits and declarations described above, Appellant also proffered that he would introduce records at an evidentiary hearing to demonstrate the State's inability to show, beyond a reasonable doubt, that defense counsel would not have pursued a different strategy absent the *Hurst* error, and that there would have been no impact on Appellant's sentence. The records Appellant would introduce include former counsel Van Cavage's motion to mitigate and sentencing letter in the 1982 Escambia County case, the court's order appointing the State's expert, and Dr. Ogburn's psychiatric evaluation. *See* Exhibits 11, 12, 13.

### D. Based on Appellant's proffer, this Court should remand with instructions to hold an evidentiary hearing on harmless error

As demonstrated above, Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless. Unlike in any other case this Court has assessed for harmless error, Appellant requested a hearing in the circuit court based on a proffer showing the harmfulness of the *Hurst* error on his sentencing. This Court's precedent encourages such hearings. In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless. This Court should remand for such a hearing.

## II. Even if this Court does not remand for a hearing, the circuit court's harmless-error ruling should be vacated and relief should be granted

### A. The circuit court contradicted this Court's precedent by ruling that the prior felony aggravator precluded *Hurst* relief

The circuit court contradicted this Court's clear precedent in ruling that "[t]he fact that the jury did not make any findings regarding the Defendant's prior convictions is not a violation of the Sixth Amendment." Order at 8. This Court's precedent establishes the opposite. Because Florida law requires a separate finding that the aggravation is "sufficient" to warrant the death penalty, a judge's finding of prior or contemporaneous felony aggravators does not reveal whether a particular jury, even if it found those same aggravators, would have agreed that the aggravators were "sufficient." That is why this Court has repeatedly rejected the logic invoked by the circuit court and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1-2 (Fla. July 27, 2017); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016).[6]

### B. Appellant's opposition to mitigation does not preclude *Hurst* relief or render the *Hurst* error harmless

Appellant opposed mitigation, but that does not preclude *Hurst* relief and is not a "waiver" within the meaning of *Mullens* because Appellant did not waive a jury recommendation and a jury did in fact make a recommendation. Appellant's

[6] In addition, the Supreme Court recently denied certiorari in *Florida v. Hurst*, No. 16-998 (May 22, 2017), where the State advanced the same logic as the circuit court.

decision not to present mitigation during the penalty phase is also insufficient to rule that the *Hurst* error in his sentencing was harmless. Even without mitigation, the *Hurst* decisions require the jury, not the judge, to make the findings of fact regarding (1) the existence of specific aggravators, and (2) the sufficiency of the aggravators to justify the death penalty, which are both "elements" subject to the Sixth Amendment. *See Hurst v.* State, 202 So. 3d at 53-59. Even if a jury would have agreed with the judge as to the third "weighing" element, there is no way to conclude whether the jury also would have agreed on the same aggravators as the judge or arrived at the same "sufficiency" conclusion as the judge. Accordingly, the absence of a mitigation presentation to the jury in this case is not sufficient for this Court to conclude that the *Hurst* error here was harmless.

### C. The advisory jury's unanimous recommendation does not render the *Hurst* error harmless because it does not allow this Court to reliably conclude that the jury would have unanimously found all of the required elements in a constitutional proceeding, especially given Appellant's proffer of evidence

This Court has indicated, in *Davis* and other cases, that a unanimous jury recommendation is a factor in *Hurst* harmless error analysis, but not necessarily a dispositive factor in every case. Here, this Court cannot reliably infer from the unanimous jury *recommendation* in Appellant's case that the same jury would have unanimously found that each of the required *elements* for a death sentence were satisfied in a constitutional proceeding. Notwithstanding any issues regarding

mitigation, this Court held in *Hurst v. State* that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) which aggravating factors were proven, and (2) whether those aggravators were "sufficient" to impose the death penalty. 202 So. 3d at 53-59. The jury's unanimous findings on those elements must precede the jury's vote as to whether to recommend a death sentence. *See id.* at 57. Therefore, even where the jury unanimously *recommended* death, there is no way to know whether the jury would have unanimously found the other preceding elements satisfied beyond a reasonable doubt. *See Hall*, 212 So. 3d 1001, 1037 (Quince, J., dissenting) ("Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown."). Appellant's jurors may have reached a unanimous overall *recommendation*, but the record does not reveal the basis for the recommendation, and there is a reasonable probability that each juror, or groups of jurors, may have based their recommendations on a different calculus. This Court has made clear that all jurors must be on the same page with respect to *each* of the underlying elements.

As the Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; *see also Mosley*, 209 So. 3d 1248, 1283. The reasoning in *Hurst v. State* applies equally here:

> Because 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.

202 So. 3d at 68. Here too, this Court cannot determine which aggravators Appellant's jury found proven beyond a reasonable doubt or how many jurors found which particular aggravators sufficient for death.

This uncertainty as to what the advisory jury would have decided if tasked with making the required findings of fact takes on additional significance in light of the principles articulated in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), which held that a death sentence cannot be imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. The Supreme Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility," and that "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 sentence lies elsewhere." *Id.* at 328-29, 341 (internal quotation omitted).

Appellant's jury was led to believe that its role in sentencing was diminished when the Court instructed it that its sentence was advisory. It was with these instructions in mind, which informed Appellant's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere,"

*id.* at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty. Given the jury's belief that it was not ultimately responsible for the imposition of Appellant's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous *recommendation* without the *Hurst* error. In light of the principles articulated in *Caldwell*, this Court therefore also cannot be certain that the jury would have unanimously found all of the other required elements satisfied.

And, as explained in Section I, *supra*, the jury's unanimous recommendation also does not account for the possibility that defense counsel's approach to the penalty phase may have been different in a constitutional proceeding, and this may have impacted the jury's ultimate decision. The impact of the unconstitutional scheme on defense counsel may have begun as early as jury selection for the penalty phase. Counsel may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order for Appellant to avoid a death sentence. Counsel would have provided Appellant with different advice and perhaps changed his mind regarding the presentation of mitigation. During the penalty phase itself, defense counsel's approach may have been different had the jury, rather than the judge, been required to unanimously find that each specific aggravating factor had been proven

beyond a reasonable doubt. Indeed, in a constitutional proceeding, defense counsel may have successfully diminished or eliminated some aggravators.

### D. This Court should abandon the idea that an advisory jury's unanimous recommendation is a factor to consider in *Hurst* harmless error analysis because such reliance violates the United States Constitution

Although it is not necessary for resolving the harmless error inquiry in Appellant's favor, there are important reasons, grounded in federal constitutional law, that this Court should abandon the reliance it has previously placed on the advisory jury's recommendation. Under the Sixth Amendment, any reliance on the jury's recommendation is problematic in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), where the Supreme Court emphasized that "[h]armless-error review looks, we have said, to the basis on which the jury actually *rested* its verdict." In Appellant's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict on the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how

> inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

*Id.* at 279-80. In Appellant's case too, any reliance on his advisory jury's unanimous recommendation would be a violation of the Sixth Amendment.

Reliance upon an advisory jury's unanimous recommendation also runs afoul of the Fourteenth Amendment. The Due Process Clause requires that, in all criminal prosecutions, the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment, and is clearly incorporated into the *Hurst* line of cases, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Any reliance on the jury recommendation requires its underpinnings to be made beyond a reasonable doubt. Because Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard, reliance on them violates due process.

## CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing on harmless error or allow a new penalty phase proceeding. Appellant also requests the opportunity for full briefing under its normal rules and for oral argument.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 8, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa A. Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com, and Harry Brody at barbara.sincerelyyours@gmail.com.

/s/ Billy H. Nolas
Billy H. Nolas

# EXHIBIT 6

IN THE SUPREME COURT OF FLORIDA

NORMAN GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1071
L.T. NO. 1998-CF-000510
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Appellant, Norman Grim, was convicted of first-degree murder and sexual battery upon a person 12 years of age or older with use of a deadly weapon in the death of Cynthia Campbell on July 27, 1998. Grim v. State, 841 So. 2d 455 (Fla. 2003).

On July 27, 1998, after being reported missing, Cynthia Campbell's body was found by fishermen off the Pensacola Bay Bridge and was wrapped in a sheet, a shower curtain, and masking tape. Grim, 841 So. 2d at 455. The investigation revealed a surveillance video showing Appellant at a convenience store near the bridge where Campbell's body was found. Id. Multiple witnesses testified to seeing him in the vicinity that day.

A piece of green carpet was found on Campbell's body under the tape during the autopsy. Grim, 841 So. 2d at 457-58. Investigators saw a similar piece of green carpet at Appellant's home. Id. at 458. The autopsy revealed Campbell's face was covered with deep abrasions and contusions, caused by blunt force trauma. Id. The blunt force injuries were consistent with a hammer and she suffered multiple stab wounds to the chest. Id.

A striped pillow case that appeared to have blood on it and matched the pattern of the sheet wrapped around Campbell was found in Appellant's kitchen trash can. Grim, 841 So. 2d at 458. Investigators also seized athletic shoes and a rope which appeared

to be consistent with the rope found on the victim's body and a pair of blood-stained denim shorts. Id. The investigation revealed forensic evidence which included the following:

> The prescription glasses found in the cooler matched Campbell's prescription records, and the roll of masking tape in the cooler was fracture-matched to the tape found on Campbell's body. The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home. Although the examiner was unable to fracture-match these pieces, he determined that they were identical in appearance, construction, and fiber type and could have originated from the same source. Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's, and the bloody fingerprints on the trash bag box were identified as Grim's.
>
> DNA analysis of stains on the cut-off jean shorts Grim was wearing when arrested revealed twelve genetic markers consistent with the DNA of Cynthia Campbell, and the steak knife found in Grim's cooler yielded six genetic markers consistent with the victim. The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the box of trash bags. Likewise, stains on a pair of blue-jean shorts and a pair of shoes found in Grim's living room bore genetic markers consistent with those of the victim.

Id. at 458-59 (internal page numbers omitted). At the penalty phase, after much discussion with the court, Appellant voluntarily and knowingly waived his right to present mitigation. (DAR V 5:812-29). The jury unanimously recommended the death penalty. The trial court followed the jury's recommendation, sentencing Appellant to death for the first-degree murder, followed by 390.5 months of

prison for the sexual battery. The trial court found three aggravating circumstances: 1) the murder was committed by a person under sentence of imprisonment, 2) the defendant had prior convictions for violent felonies, and 3) the murder was committed while the defendant was engaged in the commission of a sexual battery. Id. at 460. The trial court found three statutory mitigating circumstances[1] and seventeen nonstatutory mitigating circumstances. Id.[2]

Appellant's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. Grim, 841 So. 2d 455. Appellant filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on October 6, 2003. Grim v. Florida, 540 U.S. 892 (2003).

Subsequently, Appellant filed numerous proceedings in state and federal courts, all of which were denied. See Grim v. State,

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[1] (1) disruptive home life and child abuse (given significant weight); (2) hard-working employee (given significant weight); and (3) mental health problems that did not reach the level of § 921.141(6)(b), Florida Statutes (1997) (given great weight).

[2] The trial court also considered seventeen nonstatutory mitigators. Because many were subsumed within the statutory mitigation and thus already considered, the trial court considered the following remaining nonstatutory mitigators: (1) lack of long-term psychiatric care (no weight); (2) marital problems and situational stresses (great weight); (3) errors of judgment under stress (no additional weight); (4) model prison inmate (some weight); and (5) entered prison at a young age (given little weight).

971 So. 2d 85 (Fla. 2007); Grim v. Sec'y, Fla. Dept. of Corr., 705 F.3d 1284 (11th Cir. 2013); Grim v. Crews, 134 S.Ct. 67 (2013).

On June 24, 2016, counsel for Appellant filed a successive motion raising claims based on the United States Supreme Court's recent decision in Hurst v. Florida, 136 S.Ct. 616 (2016), in the trial court.[3] On May 8, 2017, the trial court judge entered an order, denying the successive motion without conducting an evidentiary hearing.

## OBJECTION TO ORAL ARGUMENT

Appellee objects to Appellant's request for oral argument. In the briefing schedule, this Court ordered the parties to respond to a limited issue that has been decided by this Court in other cases. As such, oral arguments would not serve any purpose other than to delay the proceedings.

## SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Appellant's successive motion for postconviction relief. The record conclusively establishes that any Hurst error was harmless beyond a reasonable doubt as the jury in this case rendered a unanimous

[3] Appellant filed several sub-issues within a single claim alleging that Appellant's death sentence was unconstitutional under Hurst. Appellant argued that Hurst was retroactive and argued that it must be applied to all death row inmates. Appellant also argued that the Hurst error was not harmless and that trial counsel would have conducted himself differently if Hurst had been in place when the case was tried.

recommendation for the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d 142, 175 (Fla. 2016). The lower court was not required to hold an evidentiary hearing in this case because the claims raised below were purely legal and would not have been aided by factual development.

Appellee objects to Appellant's brief on two grounds. First, Appellant's brief exceeds the 25-page limit set by the briefing schedule. Second, Appellant's brief exceeds the scope of the issues to be addressed as ordered by the briefing schedule. The 15-page limit for Appellee's response precludes an in-depth response to the out-of-scope issues raised by Appellant's brief. Should this Court desire additional argument on the surplus issues Appellant raised, the State will file supplemental briefing on these issues.

## STANDARD OF REVIEW

The trial court's summary denial of Appellant's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

## ARGUMENT

## ISSUE I

**APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER ANY HURST ERROR IS HARMLESS.**

In Hurst v. Florida, 136 S. Ct. 616 (2016), the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002).[4] On remand, this Court interpreted this holding as requiring the jury to make numerous factual findings prior to the court imposing a death sentence: the jury

> 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 40, 57 (Fla. 2016). However, any Hurst error is subject to harmless error review, and this Court has stated that "the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." Id. at 68.

[4] Appellant's judgment and sentence became final after Ring, and the parties did not dispute below that this Court has applied Hurst retroactively to post-Ring cases. See Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

Appellant argues that the postconviction court should have conducted an evidentiary hearing to determine whether there was harmless error in the unanimous jury verdict. This claim is meritless because a court can properly summarily deny a claim without an evidentiary hearing when the claim is controlled by existing precedent. In cases with unanimous jury death penalty recommendations, this Court has consistently found that Hurst error is harmless and defendants are not entitled to relief.

Appellant argues that the postconviction court improperly denied the successive motion without conducting an evidentiary hearing. This claim is without merit, as a postconviction court may deny the successive motion without an evidentiary hearing when the claims raised are purely legal and do not require any factual development. In Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013), this Court rejected a claim that the trial court was required to conduct an evidentiary hearing regarding a claim raised in a fifth successive postconviction motion that was controlled by existing precedent. This Court explained, that "[b]ecause Mann raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief." Furthermore, a court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. See Franqui v. State, 59 So. 3d 82, 101 (Fla. 2011). As Appellant's claim did not require any factual

development and was a purely legal issue, the postconviction court was proper in summarily denying relief under Hurst.

Appellant justifies the need for an evidentiary hearing based on speculation that a change in the law would have affected his lawyer's decisions at trial. This Court does not grant relief based on speculative claims of harmfulness; as such, holding an evidentiary hearing would not have added merit to his Hurst claim. The harmless error standard focuses on "the effect of the error on the trier-of-fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The key question in evaluating harmless error is whether there is a reasonable possibility that the error affected the verdict. Id. Harmless error is not about speculating whether another person's behavior, in this case, the trial counsel, would have changed absent the change in the law or incorrect instruction, but rather it focuses on what a reasonable jury would do under the circumstances if it had been properly instructed. As such, Appellant's allegation that his trial counsel's behavior would have differed is outside the scope of Hurst harmless error inquiries and does not justify an evidentiary hearing.[5]

Appellant's claim that consideration must be given to the fact that trial counsel would have tried the case differently under

[5] The State observes that it is hardly a new development in Florida capital litigation that a defense attorney prepares to challenge the state's case in aggravation and presents – or prepares to present mitigation during the penalty phase.

Hurst is unavailing. Appellant argues that trial counsel would have challenged the aggravators if he knew that the law was going to change; however, the evidence Appellant claims trial counsel would have presented is nothing more than mitigation. This argument ignores Appellant's waiver of presenting mitigation at the penalty phase. In the direct appeal, this Court stated that because Appellant had waived the presentation of mitigation during the penalty phase, Appellant could not then complain on appeal that the trial court abused its discretion in not calling a witness to present mitigation. Grim, 841 So. 2d at 462. Appellant had the right to present mitigation at the penalty phase, but he knowingly and voluntarily waived that right. There is no indication that he would not have waived mitigation if the law had been different when his penalty phase occurred. Prior to the ruling in Hurst, a court had to give great weight to the recommendation of the jury. Appellant was advised of that information when he waived his right to present mitigation. The change in the law does not change what the jury must consider and what weight the judge must give to the recommendation of sentence. As such, Appellant's claim that this case must be sent back for an evidentiary hearing to determine if the Hurst error was harmless is meritless.

Accordingly, as Appellant's claim did not require any factual development and was a purely legal issue, the postconviction court was proper in summarily denying relief under Hurst.

## ISSUE II

**THE POSTCONVICTION COURT'S HARMLESS ERROR RULING SHOULD NOT BE VACATED AND APPELLANT'S DEATH SENTENCE SHOULD BE UPHELD.**

Appellant argues that the Hurst error is harmful irrespective of the unanimous jury recommendation for the death penalty. This argument is in direct opposition of the case law that has been well established by this Court.

### A. ANY HURST ERROR IN APPELLANT'S CASE IS HARMLESS BEYOND A REASONABLE DOUBT.[6]

Despite the fact that Appellant's jury unanimously recommended the death penalty, Appellant nevertheless argues that the postconviction court's harmless error ruling should be vacated. Appellant's argument is without merit.

In Davis v. State, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." The aggravators in this case were either uncontestable [under sentence of imprisonment] established by prior convictions [prior violent felony], or supported by a contemporaneous jury verdict. In the instant case, the jury found Appellant guilty of

[6] Appellant's claims A-C will be addressed together under this section.

sexual battery and first-degree murder. One of the aggravators found by the judge, that the murder was committed while the defendant was engaged in the commission of a sexual battery, was also found by the jury's unanimous verdict during the guilt phase.

Given the verdict at the end of the penalty phase, there is no question that the Hurst error was harmless beyond a reasonable doubt. This Court has consistently followed Davis and found harmless error in cases involving unanimous recommendations. See, e.g., King v. State, 211 So. 3d 866, 889-90 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Knight v. State, ___ So. 3d ___, 2017 WL 411329, *14 (Fla. Jan. 31, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Truehill v. State, 211 So. 3d 930, 956 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Hall v. State, 212 So. 3d 1001, 1034 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Oliver v. State, 214 So. 3d 606, 617 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Tundidor v. State, ___ So. 3d ___, 2017 WL 1506854, *13-*14 (Fla. Apr. 27, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Guardado v. Jones, ___ So. 3d ___, 2017 WL 1954984, *2 (Fla. May 11, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Cozzie v. State, ___ So. 3d ___, 2017 WL 1954976 (Fla. May 11, 2017)(conducting harmless error analysis on

a Hurst error citing Davis). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, Appellee urges this Court to affirm the postconviction court's denial of his Hurst claim.

The trial court specifically instructed the jury that their advisory recommendation did not have to be unanimous, but the jury unanimously determined that death was the appropriate sentence. (DAR V 5:906-07). As this Court has noted, it is "inherent" in this recommendation that the jury determined that the aggravating circumstances were sufficient to impose death and that the aggravators outweighed the mitigation. Jones v. State, 212 So. 3d 321, 343 (Fla. 2017).[7] Accordingly, this Court should affirm the postconviction court's ruling denying Appellant any relief based on Hurst.

Likewise, this Court should reject Appellant's argument that the Hurst error cannot be harmless because the jury's role was minimized in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In Hall v. State, 212 So. 3d 1001 (Fla. 2017), this Court

[7] In Jones, 212 So. 3d at fn. 3, this Court stated,

> [t]he fact that Jones declined to present mitigation to the jury during the penalty phase has no bearing here. As previously stated, Jones's waiver of that right was valid, and he "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence."

(Citing Mullens v. State, 197 So. 3d 16, 40 (Fla. 2016), cert. denied, 137 S.Ct. 672 (2017).)

recently affirmed a defendant's death sentence based on a unanimous recommendation and rejected his challenge to Florida's jury instructions based on Caldwell. Id. at 1032-36 (noting that this Court has repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell).

It is well established that the harmless error test applies to constitutional error, and this Court has consistently found that a jury's unanimous death recommendation satisfies the harmless error standard as it establishes, beyond a reasonable doubt, that the jury unanimously made the requisite factual findings. See Jones, 212 So. 3d at 343 (noting that the jury's factual findings in the aggravating circumstances were sufficient to impose death and outweighed the mitigation was inherent in the jury's unanimous recommendation); King, 211 So. 3d at 889-93; Truehill, 211 So. 2d at 955-57.

As such, because there was a unanimous jury recommendation for the death penalty, the Hurst error is harmless and Appellant is not entitled to relief.

**B. THIS COURT HAS FOUND THAT HURST ERROR IS NOT STRUCTURAL ERROR.**

Appellant appears to argue that harmless error review cannot be applied to Hurst error because the verdicts in such cases are not constitutionally valid. (Initial Brief at 25). Such a claim ignores this Court's well-established precedent and is meritless.

In Hurst v. Florida, 202 So. 3d at 67, this Court found that the error that occurred in Hurst's sentencing phase, "in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review." The United States Supreme Court has stated,

> [s]ince this Court's landmark decision in Chapman v. California, 386 U.S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.

Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

> In Neder v. United States, 527 U.S. 1, 7–8 (1999), the Supreme Court held that structural error can occur in "only a 'very limited class of cases,'" and is error that always makes the trial fundamentally unfair. Where an element of the offense was erroneously not submitted to the jury in *Neder,* the Court found harmless error review applied and that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review."

Hurst, 202 So. 3d at 67 (citing Neder, at 8). In Washington v. Recuenco, 548 U.S. 212, 218-19 (2006), the United States Supreme Court held, in a noncapital case, that "failure to submit a sentencing factor to the jury in violation of Apprendi, Blakely, and the Sixth Amendment was not structural error that would always result in reversal." Hurst, at 67. This Court has stated that a harmless error analysis is appropriate in errors involving jury factfinding. Galindez v. State, 955 So. 2d 517, 522 (Fla. 2007). This Court stated, the test asks whether there is "reasonable doubt

that a rational jury would have found the defendant guilty absent the error." Id. (citing Neder, 527 U.S. at 18). The same harmless error analysis developed in Chapman v. California, 386 U.S. 18 (1967), which "applied in cases concerning the erroneous admission of evidence under the Fifth and Sixth Amendments, also applied to infringement of the jury's factfinding role." Galindez, 955 So. 2d at 522.

As such, pursuant to Davis and other existing precedent, the Hurst error does not require a reversal, and any Hurst error in this case is harmless beyond a reasonable doubt.

## CONCLUSION

In conclusion, any Hurst error in Appellant's case is harmless beyond a reasonable doubt, and Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant relief under Hurst.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 16th day of August, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Billy Nolas, counsel for Appellant, at billy_nolas@fd.org and Harry Brody at Barbara.sincerelyyours@gmail.com.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
COUNSEL FOR APPELLEE

# EXHIBIT 7

**No. SC17-1071**

IN THE

# Supreme Court of Florida

NORMAN M. GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

## APPELLANT'S REPLY BRIEF

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## RENEWED REQUESTS FOR FULL BRIEFING AND ORAL ARGUMENT

Appellant respectfully renews his requests to allow oral argument pursuant to Fla. R. App. P. 9.320, and for the opportunity to file a full, untruncated brief pursuant to the standard Florida Rules of Appellate Procedure. This appeal presents important issues of first impression regarding whether a hearing should be held when a defendant proceeding under Rule 3.851 proffers evidence to the circuit court rebutting the State's position that the *Hurst* error at his sentencing was harmless beyond a reasonable doubt. These issues are more important and complex than the State's answer brief suggests, and would be aided by full briefing and argument.

## ARGUMENT

### I. The State is correct that *Hurst* is retroactive and that the circuit court's summary harmless-error ruling should be reviewed de novo

The State's brief acknowledges that the *Hurst* decisions apply retroactively to Appellant. *See* Answer Br. at 6 n.4. As the State correctly recognizes, the *Hurst* decisions are retroactive under Florida law because Appellant's death sentence became final in 2003, after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).[1] The State agrees with Appellant and the

[1] In addition, as Appellant argued in the circuit court and his initial brief, the *Hurst* decisions are retroactive as a matter of federal law. *See* Defendant's Memorandum of Law at 12-13 (Santa Rosa Cty., No. 1998-CF-000510,filed Nov. 11, 2016) (discussing federal cases, including *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (holding that federal law requires states to apply substantive rules retroactively)). The State's brief fails to address federal retroactivity.

circuit court that the only issue in this *Hurst* case is whether relief is precluded by the "harmless error" doctrine. The State correctly notes that the harmless-error test asks whether there is "no reasonable probability that the error contributed to the sentence." Answer Br. at 6 (citing *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016)).

The State is also correct that this Court should conduct de novo review of the circuit court's summary harmless-error ruling. Answer Br. at 5 (citing *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009)); *see also Jackson v. Dugger*, 931 F.2d 712, 717 (11th Cir. 1991) ("Harmless error is a mixed question of law and fact subject to de novo review"). And, as the State recognizes, this Court should accept Appellant's factual allegations as true to the extent they are not refuted by the record, and the circuit court should not be affirmed unless the record conclusively establishes that no relief is available. *See* Answer Br. at 5 (citing *Walton*, 3 So. 3d at 1005).

## II. The State does not dispute that a jury "waiver" analysis under *Mullens* does not apply here

The State does not dispute that, although Appellant instructed his counsel not to present mitigation, this fact alone does not foreclose *Hurst* relief under this Court's jury "waiver" cases, such as *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Those waiver cases do not apply here because Appellant (1) did not waive his right to jury fact-finding regarding two required elements—the applicable aggravators and the "sufficiency" of the aggravators for the death penalty; and (2) did not waive his right to a jury recommendation following the penalty phase. As the circuit court

found, and the State's brief reflects, this is not a jury-waiver *Hurst* case, given that "a jury did in fact consider what sentence should be imposed." Order at 7.

## III. The State mischaracterizes harmless-error analysis in this case as a "pure legal issue," rather than a mixed question of law and fact that requires further evidentiary development

The State mischaracterizes harmless-error analysis in this case as a "pure legal issue" that involves no factual inquiry beyond the existing record. Answer Br. at 7. Fundamentally, the State fails to recognize that harmless-error analysis of constitutional errors is not simply a matter of law, but a mixed question of law and fact. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *see also Jackson*, 931 F.2d at 717 ("Harmless error is a mixed question of law and fact subject to de novo review"); *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir. 1982) (collecting cases analyzing harmless error as mixed question of law and fact). Even the standard of proof for harmless error—beyond a reasonable doubt—is commonly understood as a factual, rather than a legal, standard. A proper harmless-error analysis requires an examination of the entire record, "including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *DiGuilio*, 491 So. 2d at 1135. But this Court has also recognized that the existing record may not always be sufficient to allow a meaningful harmless-error analysis.

Where the existing record is insufficient to determine whether a constitutional error was harmless beyond a reasonable doubt, this Court has fond that further factual development is warranted. *See, e.g.*, *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) (ordering a hearing based on a defendant's proffer that was "sufficient to negate the conclusion that the *Hitchcock* [*v. Dugger*, 481 U.S. 393 (1987)] error was harmless."); *see also Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995) (considering impact of penalty-phase evidence that could have been presented and granting relief due to the effect of the unconstitutional error on defense counsel).

The State fails to recognize that harmless-error analysis of *Hurst* claims like Appellant's implicates facts that may not be available in the existing record. The State acknowledges that "[t]he key question in evaluating harmless error is whether there is a reasonable possibility that the error affected the verdict," Answer Br. at 8, but does not consider the possible ways that a penalty phase could unfold differently where the parties and counsel are aware that the jury, rather than the judge, will conduct fact-finding on the required elements for a death sentence. Appellant's defense counsel, for instance, may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order to avoid a death sentence. Counsel's approach to the evidence presented at the penalty phase also may have been different had the jury been required to unanimously find that each specific aggravating factor

had been proven beyond a reasonable doubt. Indeed, in a constitutional proceeding, counsel may have diminished or eliminated some aggravators. Counsel also could have provided Appellant with different advice and perhaps changed his mind regarding the presentation of mitigation. As Appellant argued in the circuit court and his initial brief, these are factual matters that are not part of the existing record and warrant further development to allow for an informed harmless-error analysis.[2]

Appellant's proffer is the circuit court was sufficient to grant a hearing. As explained in his initial brief, Appellant proffered substantial evidence in the circuit court indicating that that (1) the aggravators were not challenged by his penalty-phase counsel because of counsel's practice, a pre-*Hurst* practice followed by Florida lawyers at that time; (2) in a constitutional proceeding without *Hurst* error, Appellant's counsel could have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different. In support of his proffer, Appellant provided the circuit court with records and declarations from prior counsel, a

[2] To the extent the State argues that Appellant is exceeding the scope of harmless-error review by arguing that a change in defense counsel's approach would by itself render the *Hurst* error harmless, *see* Answer Br. at 8, the State is missing the point. Appellant proffered evidence that his entire penalty phase would have been *different* without the constitutional error. A hearing is necessary to allow Appellant to present his evidence, and allow an informed determination of how the proceeding would have differed and whether the outcome would have been the same beyond any doubt.

psychological expert, and witnesses.[3] Without a hearing on Appellant's evidence, the circuit court should not have found Appellant's *Hurst* error harmless beyond a reasonable doubt. Therefore, remanding for such a hearing is the appropriate course.

## IV. The State's arguments for affirming the circuit court's harmless-error ruling based on certain aggravators found by the trial judge ignore the plain language of *Hurst v. Florida* and have been rejected by this Court

The State's arguments for affirming the circuit court's ruling based on what the State says are "uncontestable" aggravators found by the trial judge—those based on prior and contemporaneous felony convictions, *see* Answer Br. at 10-11—ignore the plain language of *Hurst v. Florida* and have been rejected by this Court. The United States Supreme Court recognized in *Hurst v. Florida* that Florida's scheme requires determination of "whether *sufficient* aggravating circumstances existed to justify imposition of the death penalty." *Hurst v. Florida*, 136 S. Ct. at 619 (emphasis added); *see also id.* at 622 ("The trial court *alone* must find "the facts . . .[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances.") (quoting Fla. Stat. § 921.141(3)). The sufficiency requirement means there can be no prior or contemporaneous conviction aggravator exemption to *Hurst*, as the State asserts.

[3] Notably, the State's brief fails to specifically discuss any of Appellant's proffered evidence or explain why the evidence is insufficient to create an inference that, without the *Hurst* error, the penalty phase would have been different in ways that create a reasonable probability of a different result.

This Court has repeatedly rejected the State's argument that a *Hurst* error is rendered harmless where the trial judge found aggravators based on contemporaneous or prior felony convictions, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1-2 (Fla. July 27, 2017); *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 v. Florida*."); *McGirth v. State*, 209 So. 3d 1146, 1150 (Fla. 2017) (contemporaneous felony aggravator); *Mosley*, 209 So. 3d. at 1256 (same); *Armstrong v. State*, 211 So. 3d 864, 864-65 (Fla. 2017) (prior violent felony aggravator); *Calloway v.* State, 210 So. 3d 1160, 1176 (Fla. 2017) (same); *Simmons v. State*, 207 So. 3d 860, 861 (Fla. 2016) (same); *Williams v. State*, 209 So. 3d 543, 554 (Fla. 2017) (prior violent felony and contemporaneous felony aggravators).[4]

## V. The State's remaining arguments for affirming the circuit court's harmless-error ruling based on the unanimous jury recommendation cannot be squared with state or federal law

The State's remaining arguments for affirming the circuit court's harmless-err ruling based on the jury's unanimous recommendation cannot be squared with

[4] In addition, as this Court is aware, the United States Supreme Court recently denied a writ of certiorari in *Florida v. Hurst*, No. 16-998 (U.S. May 22, 2017), where the State raised the same arguments regarding prior and contemporaneous felony aggravators that it raises here.

state and federal law. *See* Answer Br. at 11-15. Contrary to the State's assertions, *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), should not foreclose *Hurst* relief in every case where the advisory jury renders a unanimous recommendation. The State draws an untenable inference from the unanimous jury *recommendation* in Appellant's case that the same jury would have unanimously found that each of the required *elements* for a death sentence were satisfied in a constitutional proceeding without the *Hurst* error. Even setting aside mitigation, this Court held in *Hurst v. State* that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) which aggravating factors were proven, and (2) whether those aggravators were "sufficient" to impose the death penalty. 202 So. 3d at 53-59. Those findings of fact must precede the jury's vote as to whether to recommend a death sentence. *See id.* at 57. Even though the jury unanimously *recommended* death in Appellant's case, the State fails to persuasively explain how it can infer from that recommendation that "there is no question" the jury would have unanimously found the other preceding elements satisfied without the *Hurst* error.

The State misunderstands the importance of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), in this context. *See* Answer Br. at 12-13. Appellant is not challenging jury instructions under *Caldwell*. Rather, the principles articulated in *Caldwell* inform the harmless-error analysis of his *Hurst* claim because they highlight the uncertainty of what the jury would have decided if it was tasked with

making the findings of fact required to impose a death sentence. In *Caldwell*, the Supreme Court highlighted that a jury's understanding of its role in death sentencing impacts its ultimate decision-making. That is why the Court held that "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 sentence lies elsewhere." *Caldwell*, 472 U.S. at 328-29, 341. Here, Appellant's jury was informed of its diminished "advisory" role. It was with that knowledge in mind that the jurors rendered a unanimous recommendation to impose the death penalty. The State fails to recognize that, given the jury's belief that it was not ultimately responsible for the imposition of Appellant's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous *recommendation* without the *Hurst* error. In light of the principles articulated in *Caldwell*, this Court therefore also cannot be certain that the jury would have unanimously found all of the other required elements satisfied.

The State also misunderstands Appellant's argument regarding the impermissibility of relying on a jury recommendation that does not comport with constitutional requirements. *See* Answer Br. at 13 ("Appellant appears to argue that harmless error review cannot be applied to *Hurst* error because the verdicts in such cases are not constitutionally valid."). Appellant does not assert here that harmless

error review cannot be applied to *Hurst* error. Appellant's argument is that an advisory jury's unanimous recommendation cannot serve as the basis for deeming a *Hurst* error harmless because that jury recommendation was not grounded in the beyond-a-reasonable-doubt standard and does not comport with the constitutional definition of a jury verdict. Under *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. Reliance on Appellant's advisory jury's unanimous recommendation in denying *Hurst* relief as harmless would violate the Sixth Amendment under *Sullivan*.[5]

## CONCLUSION

For the reasons above and in Appellant's initial brief in response to this Court's July 19, 2017 order, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing on harmless error or allow a new penalty phase proceeding. Appellant also requests the opportunity for full briefing under the ordinary appellate rules and for oral argument.

[5] In addition, the Fourteenth Amendment requires that the State must prove each criminal element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Any reliance on the jury recommendation requires its underpinnings to be made beyond a reasonable doubt. Because Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard, reliance on them violates due process.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa A. Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com, and Harry Brody at barbara.sincerelyyours@gmail.com.

/s/ Billy H. Nolas
Billy H. Nolas

# EXHIBIT 8

**IN THE SUPREME COURT OF FLORIDA**

**NORMAN MEARLE GRIM**,

Appellant,

v. **Case No. SC17-1071**

**STATE OF FLORIDA**,

Appellee.
_____/



**MOTION FOR REHEARING AND CLARIFICATION**

Appellant moves for rehearing and clarification of this Court's March 29, 2018, opinion affirming the denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court's March 29 decision was objectively unreasonable as a matter of federal law and state law. Under Fla. R. App. P. 9.300(a), rehearing is appropriate because the Court overlooked and misapprehended points of fact and law establishing that the advisory jury's unanimous death recommendation in Appellant's case was not a valid basis for the circuit court to summarily deny *Hurst* relief under the "harmless error" doctrine, particularly in light of Appellant's evidentiary proffer and request for a hearing. Clarification is also appropriate regarding significant matters that were raised in Appellant's briefs but were not acknowledged or discussed in the March 29 opinion.

## I. The Court failed to address or even acknowledge the significant evidence Appellant proffered below in support of his request for a hearing on whether the *Hurst* error in his case was harmless, including declarations of prior counsel, a psychological expert, and multiple witnesses

The March 29 opinion failed to address or even acknowledge the significant evidence Appellant proffered in the circuit court in support of his request for a hearing on whether the *Hurst* error in his case was harmless, a proffer that included declarations by prior counsel, a psychological expert, and multiple witnesses. Appellant's briefs in this Court included extended discussion of this evidentiary proffer, the proffer's implications for the State's harmless-error burden, and the circuit court's refusal to grant a hearing. *See* Appellant's Br. at 6-20, 21-25. Appellant's proffer cast real doubt on whether the outcome of his penalty phase would have been the same without the *Hurst* error, particularly given the unconstitutional statute's effect on defense counsel's approach to the aggravation. Nevertheless, the March 29 opinion unreasonably omitted any acknowledgment or discussion of Appellant's proffer or why it was insufficient for a hearing.

Appellant's compelling proffer should not be ignored. Based on his proffer, Appellant could establish at a hearing that (1) the aggravators sought by the State were not challenged by his counsel because of a pre-*Hurst* practice followed by counsel here and other lawyers at the time; (2) in a constitutional proceeding without *Hurst* error, Appellant's counsel would have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the

weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different.

Appellant proffered declarations from prior counsel, Michael Van Cavage and John Bigham, who represented him on previous felony charges that were used by the State as aggravation in the capital penalty phase. Mr. Van Cavage was counsel for Appellant in 1983, when Appellant was convicted in Escambia County of robbery, burglary, kidnapping, and weapons offenses. Mr. Bigham was appointed to represent Appellant in 1991 on a burglary charge in Bell County, Texas. As Appellant explained in his brief, the information in Mr. Van Cavage's and Mr. Bigham's declarations would be relevant to diminishing the weight of the prior-felony/parole status aggravating factors or other aggravators alleged by the State. *See* Appellant's Br. at 10-13. The March 29 opinion did not acknowledge or discuss the declarations of Mr. Van Cavage and Mr. Bigham.

Appellant also proffered a declaration by Dr. Jethro Toomer, Ph.D. Dr. Toomer's declaration set forth his opinion regarding the nature, weight, and significance of Appellant's aggravating circumstance arising from his prior convictions. Dr. Toomer's review of the witness statements, in combination with the records relating to Appellant's convictions, revealed that Appellant has serious psychological and substance abuse problems. Dr. Toomer's review of the records of Appellant's prior offenses also shed light on the psychological and substance-

abuse issues underlying his prior convictions. As Appellant explained, Dr. Toomer's opinion is that the nature and significance of the priors, under all relevant circumstances, is not substantial or especially weighty in a capital sentencing context. *See* Appellant's Br. at 13-14. The March 29 opinion did not acknowledge or discuss Dr. Toomer's declaration.

Appellant also proffered declarations from multiple witnesses—Mark Bowden, Ronald Horton, Kathy Smith, Charlotte May, Charles Raab, Victoria McKee, and Nona Young—who provided information relevant to challenging aggravation in the case. *See* Appellant's Br. at 14-19. The March 29 opinion did not acknowledge or discuss any of these declarations.

In addition to the declarations, Appellant explained that he also proffered that he would introduce records at an evidentiary hearing to demonstrate the State's inability to show, beyond a reasonable doubt, that defense counsel would not have pursued a different strategy absent the *Hurst* error, and that there would have been no impact on Appellant's sentence. *See* Appellant's Br. at 19. The March 29 opinion did not explain why such a hearing should not be granted.

The March 29 opinion failed to address Appellant's arguments under *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), and *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), which Appellant explained favor a hearing in the circuit court when evidence such as Appellant's is proffered. *See* Appellant's Br. at 8. Instead, the

Court, as it has uniformly done in other *Hurst* cases where the advisory jury unanimously recommended the death penalty, relied entirely on the advisory jury's vote in holding the *Hurst* error in Appellant's case harmless. *See Grim v. State*, No. SC17-1071, 2018 WL 1531121, at *1 (Fla. Mar. 29, 2018).

The March 29 opinion ignored Appellant's significant proffer and affirmed based on a unconstitutional bright-line analysis holding that no defendants whose advisory juries unanimously recommended the death penalty are entitled to individualized review of their *Hurst* claims, no matter what evidence they provide. The Court's decision resulted in a denial of Appellant's due process rights and undermines the reliability of Florida's death sentences.

## II. The Court did not explain how the *Hurst* error in Appellant's case can be deemed harmless beyond a reasonable doubt when mitigating evidence existed but was given only to the judge, not the jury

The March 29 opinion did not explain how the *Hurst* error in Appellant's case can be harmless beyond a reasonable doubt, based solely on the advisory jury's unanimous death recommendation, given that mitigating evidence existed and was available to the trial judge, but was never presented to the jury. The Eighth and Fourteenth Amendments require that a jury in a capital case not be precluded from considering individualized mitigation. *See Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982). "[T]he Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" *Porter v. McCollum*, 558

U.S. 30, 42 (2009) (quoting *Eddings*, 455 U.S. at 1982). In light of *Hurst*'s holding that a jury must make the findings of fact supporting a death sentence, including a finding that mitigation in the case outweighs the aggravation, the Court's March 29 opinion fails to explain how Appellant's *Hurst* error can be harmless based on the vote of an advisory jury that never heard the available mitigation. Because Appellant's advisory jury never heard mitigation, any implicit jury finding regarding the relative weight of the aggravation and mitigation is not valid in his case. Appellant should be permitted to present his mitigation to a jury.

With respect to Appellant's alleged "waiver" of his right to present mitigation to the advisory jury, Appellant initially notes that the Court's March 29 opinion makes contradictory statements. The Court first states, correctly: "The fact that Grim declined to present mitigation to the jury during the penalty phase has no bearing here." *Grim*, 2018 WL 1531121, at *1 n.1. However, in the very next sentence, the Court wrongly describes the relevance of Appellant's decision not to present mitigation to the jury: "Grim's waiver of that right was valid, and he 'cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence.'" *Id.* (quoting *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016)). Those two sentences, which appear back-to-back in footnote 1 of the March 29 opinion, leaves unclear what effect Appellant's decision not to present mitigation to a jury, even though he

exercised his right to a jury at the penalty phase, has on his *Hurst* claim.

This Court should clarify that, as the circuit court correctly found, and as this Court correctly suggested in the first sentence of footnote 1, Appellant's decision not to present mitigation to the advisory jury has no bearing on his *Hurst* claim. Although Appellant chose not to present mitigation to the advisory jury in the context of Florida's prior capital sentencing scheme, he could not at that time have validly waived his right to present mitigation to a jury that was empowered to conduct fact-finding as required by *Hurst*. *See Halbert v. Michigan*, 545 U.S. 605, 623 (2005) (holding that defendants cannot be held to have waived rights that were not recognized to exist at the time of the waiver).

Because Appellant's advisory jury never heard the available mitigation in the case, the jury's vote cannot serve as the sole basis for holding the *Hurst* error in the case harmless. This Court should grant rehearing and hold that Appellant is entitled to present his mitigation to a jury in a proceeding that complies with *Hurst*, or at a minimum, this Court should remand for a hearing on whether the whole record, not just the advisory jury vote, establishes that the *Hurst* error in Appellant's case was harmless beyond a reasonable doubt.

## III. The Court did not address how the advisory jury's unanimous recommendation can serve as the sole basis for harmless error analysis in light of *Hurst*'s implications for *Caldwell* analysis

At least three Justices of the United States Supreme Court have expressed

grave concern with this Court's failure to recognize the significance of *Caldwell v. Mississippi*, 472 U.S. 320 (1987), for death sentences imposed in Florida before *Hurst*. *See Guardado v. Jones*, 138 S. Ct. 1131 (2017) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from the denial of certiorari). This Court's March 29 opinion in Appellant's case failed to address whether, as Appellant argued, the per se harmless-error rule this Court has crafted for *Hurst* claims is inconsistent with the Eighth Amendment in light of *Caldwell*.

In *Caldwell*, the United States Court disapproved comments that "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held that "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 sentence lies elsewhere." *Id.* at 328-29.

Here, the March 29 opinion fails to recognize that the jurors in Appellant's case were repeatedly told by the trial court that their recommendation was advisory

and that the final sentencing decision rested solely with the judge. Appellant's jury was led to believe that its role in sentencing was diminished when the court instructed it that its sentence was advisory. It was with these instructions in mind, which informed Appellant's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *id.* at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors told researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961.

One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the

defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-Hurst advisory jury instructions, "I didn't want this on my conscience." *Id.*

This Court's per se harmless-error rule for *Hurst* claims cannot predict, without review of the specific record, that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously reached the same conclusion as the advisory jury that was told that its role was subordinate. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). The failure of this Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Appellant's, is inconsistent not only with the United States Supreme Court's harmless-error precedents, but also with the Eighth Amendment.

## IV. This Court's per se harmless-error rule perpetuates the underlying federal constitutional error by failing to allow for individualized review of the error's impact in the context of the record as a whole

Under its per se harmless-error rule, this Court has uniformly denied relief in every case where the jury unanimously rendered a death recommendation pre-*Hurst*, regardless of the underlying facts. This rule contravenes the requirement that state courts, especially in capital cases, conduct an individualized review of the record as

a whole before denying federal constitutional relief on harmless-error grounds. In contrast to established principles of constitutional law, the rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case in which the advisory jury unanimously recommended death.

As Appellant's case and other cases demonstrate, when a jury working under Florida's unconstitutional system reached a unanimous advisory recommendation of death, this Court refuses to entertain any individualized arguments before holding the federal constitutional *Hurst* error harmless beyond a reasonable doubt.

The United States Supreme Court's precedent is clear that harmless-error analysis must include a fact-specific review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose v. Clark*, 478 U.S. 570, 583 (1986) ("We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless."); *see also Fulminante*, 499 U.S. at 306 (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt").

This Court's per se harmless-rule defies the United States Supreme Court's precedent. Despite Appellant's detailed, evidence-based arguments regarding the impact of the *Hurst* error on his death sentence, the March 29 opinion refused to address them. This Court has followed the same mechanical approach to harmless-error analysis in every capital case in which the pre-*Hurst* advisory jury's recommendation was unanimous.

The per se rule flouts the reasoning in *Barclay v. Florida* that "[this] Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958; *see also Sochor v. Florida*, 504 U.S. at 541 (harmless-error rulings must be accompanied by specific reasoning grounded in the whole record); *Clemons v. Mississippi*, 494 U.S. at 752 (same); *Parker v. Dugger*, 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

The per se rule relieves the State of its burden to prove *Hurst* errors harmless beyond a reasonable doubt. *See Fulminante*, 499 U.S. at 297 ("*Our review of the record leads us to conclude* that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error.") (emphasis added). In *Hurst*, this Court stated that "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to

unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence." *Hurst v. State*, 202 So. 3d at 68. But this idea has now been abandoned through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. Even though it is undisputed that Appellant's death sentence was imposed under a capital sentencing scheme that violated the Federal Constitution, the per se rule for unanimous-jury-recommendation cases effectively leaves the State with no burden at all.

## V. This Court's per se harmlessness rule fails to ensure sufficient reliability in Appellant's death sentence

In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless-error analysis must begin with what *Hurst* held that a jury must do for a Florida death sentence to be constitutional: make the findings of fact regarding the elements required for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.

The second and third of these elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would have held the *Hurst* error harmless because the evidence supported the trial judge's finding of "at

least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as this Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty.* The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. The United States Supreme Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment's requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific *findings of fact* to support a death sentence in a constitutional proceeding.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency"

determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently.

The State bears the burden of dispelling these possibilities beyond a reasonable doubt on an individualized basis. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The per se rule relieves the State of its burden. In a capital case, this violates the federal constitutional requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also Godfrey*, 446 U.S. at 428 ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

## VI. This Court's per se harmlessness rule relies entirely on advisory jury decisions not capable of supporting harmless-error analysis under *Sullivan*

The Court's March 29 opinion did not grapple with *Sullivan v. Louisiana*, 508 U.S. 275 (1993), wherein the United States Supreme Court recognized that there are some jury errors that cannot be subjected to harmless-error analysis. The error in *Sullivan* was the trial court's defective instruction to the jury regarding the

requirement that each element of the offense must be found beyond a reasonable doubt—an error that the Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. The Court unanimously held that even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). Without a constitutionally-valid jury verdict, the Court found, "the entire premise of *Chapman* review is simply absent," *id.* at 281, because such review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (emphasis in original).

The per se harmless-error rule for *Hurst* claims presents the question whether *Chapman* and the Supreme Court's other harmless-error precedents permit state courts in capital cases to rest harmless-error rulings *entirely* on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. The United States Supreme Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure

to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all the elements for a death sentence under Florida law. As the Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial judge, not the jury, to make findings of fact. Florida's improper jury instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.

*Sullivan* instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* (emphasis in original). The Court's per se harmless-error rule directly contradicts that principle. The rule relies entirely, to the exclusion of all other considerations, on the votes of advisory juries. The Supreme Court held in *Hurst* that those juries conducted no valid fact-finding within the meaning of the Sixth Amendment. Under *Sullivan*, the per se harmlessness rule is unconstitutional because it relies entirely on a non-verdict to uphold a sentence of death.

## VII. Conclusion

Rehearing should be granted and the Court should hold that the *Hurst* error is not harmless in light of Appellant's proffered evidence, or remand for the circuit court to make that determination following a hearing.

Respectfully submitted,

/s/ Billy H. Nolas
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa A. Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com, and Harry Brody at barbara.sincerelyyours@gmail.com.

/s/ Billy H. Nolas
Billy H. Nolas

# EXHIBIT 9

STATE OF FLORIDA )
) ss
COUNTY OF ESCAMBIA )

**Declaration of Michael A. Van Cavage**

I, Michael A. Van Cavage, declare on this 26th day of Oct. 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I was an attorney licensed to practice in the State of Florida. I was defense counsel for Norman Grim in 1983 when Mr. Grim was convicted in Escambia County of robbery, burglary, kidnapping, and weapons offenses.

2. In 2000, Mr. Grim was convicted in Santa Rosa County of murder and sentenced to death. In sentencing Mr. Grim to death, Judge Kenneth Bell found and gave great weight to the aggravating circumstance that Mr. Grim had previous felony convictions, including the 1983 convictions when I served as defense counsel.

3. Mr. Rollo did not contact me before or during Mr. Grim's 2000 penalty phase. Had Mr. Rollo contacted me, I would have gladly provided him with information concerning Mr. Grim's 1983 convictions that would have been relevant to diminishing the weight of the prior-felony aggravating circumstance or other aggravating circumstance alleged by the State.

4. For instance, before trial I moved for the appointment of two psychiatric experts to evaluate Mr. Grim's competency and his mental state at the time of the 1982 offenses. In my motion, I stated that I had reason to believe that

Mr. Grim may have been incompetent at the time of the commission of the offense and may be incompetent to assist counsel with his defense. The court agreed to appoint only the state's expert, Dr. B.R. Ogburn, M.D., to conduct a psychiatric evaluation of Mr. Grim.

5. Dr. Ogburn examined Mr. Grim on three separate occasions, reviewed court documents, and interviewed Mark Bowden, a friend of Mr. Grim's who was with him on the evening prior to the 1982 offenses. Dr. Ogburn concluded that, on the night of the 1982 offenses, Mr. Grim was intoxicated and succumbed to loss of control stemming from a woman turning him down for another man. Dr. Ogburn further concluded that Mr. Grim's crimes were not planned or premeditated but the result of emotional "triggering" that occurred on the previous night. Dr. Ogburn concluded that Mr. Grim was unable to form specific intent for the 1982 crimes.

6. Prior to Mr. Grim's sentencing for the 1983 convictions, I presented arguments to the court seeking leniency in addition to psychiatric care during incarceration. In a motion to mitigate, in which I argued that Mr. Grim should not spend the majority of his adult years in prison, I referenced Dr. Ogburn's report and stated that Mr. Grim could function and work as a productive member of society if he was provided with adequate psychiatric care. I also noted that, during his pre-trial detention in the Escambia County jail, Mr. Grim had not had any problems with jail officials and had exhibited the ability to function properly within the jail system.

In a separate letter to the court, I expressed my belief that Mr. Grim was not acting maliciously when he committed the 1982 offenses. I noted that Mr. Grim's normal personality is that of a shy young man who at least in personal conversations exhibits no hostility and appears genuinely baffled by his behavior in committing the 1982 offenses. My letter noted that Mr. Grim had been drinking for most of the night of the offenses, which may account for his behavior. I also stated my agreement with Dr. Ogburn that Mr. Grim was unable to form specific intent to commit the 1982 crimes, which were marked by irrationality.

7. The 1983 judgments setting out Mr. Grim's convictions and sentences explicitly imposed a requirement that Mr. Grim receive psychiatric care in prison.

8. Had I been contacted by defense counsel before or during Mr. Grim's 2000 penalty phase, I would have provided the above information, as well as any other information in my files and my recollection that may have been relevant to diminishing the weight of the prior-felony or any other aggravating circumstances. I would have been willing to testify.

Michael A. Van Cavage

**Declaration of John R. Bigham**

I, John R. Bigham, declare on this 28 day of OCTOBER 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a retired lawyer who formerly practiced criminal defense in the State of Texas. On January 4, 1991, I was appointed by the 27th Judicial District Court of Bell County, Texas to represent Norman Grim on a charge of burglary.

2. The State of Texas agreed to enter into a plea agreement with Mr. Grim. In exchange for Mr. Grim pleading guilty to second-degree burglary of a building, the State agreed to recommend a sentence of 20 years' imprisonment. On January 17, 1991, I, Mr. Grim, and the prosecutor executed a written waiver of jury and agreement to stipulate upon a plea of guilty to burglary with a recommended 20-year sentence. The Court accepted the plea and imposed the recommended sentence.

3. In 2000, Mr. Grim was convicted in Santa Rosa County, Florida of murder and sentenced to death. In sentencing Mr. Grim to death, Judge Kenneth Bell found and gave great weight to the aggravating circumstance that Mr. Grim had previous felony convictions and was under a sentence of imprisonment or parole, including the 1991 Texas conviction when I served as Mr. Grim's defense counsel, and Mr. Grim's parole status on the Texas charge when he committed the Florida capital offenses.

4. Michael Rollo, Mr. Grim's defense counsel for the 2000 murder trial in Florida, did not contact me before or during Mr. Grim's penalty phase. Had Mr. Rollo contacted me, I would have provided him with information concerning Mr. Grim's 1991 Texas conviction that may have been relevant to diminishing the weight of the prior-felony aggravating circumstance or other aggravating circumstance alleged by the State.

5. For instance, Mr. Grim's plea-negotiated sentence of 20 years' imprisonment reflected the fact that he had a prior felony as much or more than the seriousness of the Texas burglary itself. In my experience as a criminal defense attorney in Bell County, Texas, a first-time offender likely would have been charged with second-degree burglary and been permitted to plead to a lesser charge and receive probation. However, because Mr. Grim had a prior felony record, he likely would have been tried for a first-degree felony with a possible sentence of up to 99 years had he decided to plead not guilty. By entering into a plea agreement, Mr. Grim was permitted to plead guilty to a second-degree felony with a recommended sentence of 20 years. In my experience, the State would not have accepted a reduction in the burglary charge if prosecutors felt that the offense itself was too serious to reduce to second-degree burglary.

6. Had I been contacted by defense counsel before or during Mr. Grim's 2000 penalty phase, I would have provided the above information, as well as any

other information in my files and my recollection that may have been relevant to diminishing the weight of the prior-felony or any other aggravating circumstances. I would have been willing to testify.

John R Bigham

John R. Bigham

State Bar of Texas
02312800

**Declaration of Jethro Toomer, Ph.D.**
**Pursuant to 28 U.S.C. § 1746**

I, Jethro Toomer, Ph.D., declare on this 4th day of November 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct.

1. I am a licensed psychologist. My practice includes clinical and forensic psychology. I have been qualified by federal and state courts in several jurisdictions to testify about psychological questions arising in capital cases and other forensic issues. I have been serving as an expert psychological witness in capital cases for over four decades. I have also served as a professor of psychology.

2. Counsel to Norman Grim has asked me to provide a declaration setting forth my opinion regarding the nature, weight, and significance of the prior convictions aggravation in Mr. Grim's case. To that end, counsel provided me with witness declarations and affidavits from the following individuals: Mark Bowden, Ronald Horton, Kathy Smith, Charlotte May, Victoria McKee, Charles Raab, and Nona Young. Counsel also provided me with various records relating to Mr. Grim's prior convictions, as well as records relating to his 2000 trial and death sentencing in Santa Rosa County. I have reviewed those materials, which relate the following relevant information, among other things.

3. Mark Bowden is the witness closest to Mr. Grim. Mr. Bowden says that he and Mr. Grim were best friends, and basically brothers. Mr. Bowden

relates that Mr. Grim has deep-seeded psychological and substance abuse problems. Mr. Grim was self-destructive and used excessive amounts of alcohol and drugs to help cope with his psychological problems.

4. Several of the declarants relate that, when Mr. Grim was drinking, he lost control and engaged in acts that he never would engage in while sober. When he was drunk, Mr. Grim's friends described him as assuming a different personality. One of the victims of his crimes, Nona Young, described him as "a mess, didn't look right and his eyes were strange." The circumstances of Mr. Grim's prior offenses are described by those who knew him and/or were with him around the time of the offenses as driven by alcoholism, drug use, and other psychological issues. Mr. Bowden had been on two-day drinking binge with Mr. Grim immediately preceding Mr. Grim's September 1982 arrest for kidnapping. Charlotte May, Charlie Raab, and Kathy Smith describe the circumstances of their participation with Mr. Grim in a September 1981 robbery in Duval County as being precipitated by heavy, weeks-long alcohol and drug use. Ronald Horton describes committing a 1990 robbery in Texas with Mr. Grim in the midst of an alcohol binge. Two of the victims of Mr. Grim's offenses, Nona Yong and Victoria McKee, relate in their declarations that they do not wish Mr. Grim to be executed.

5. The records provided to me by counsel also shed light on the psychological and substance-abuse issues underlying Mr. Grim's prior convictions. For instance, Mr. Grim's counsel on his 1983 Escambia County convictions, Michael Van Cavage, moved for the appointment of psychiatric experts to evaluate Mr. Grim's mental state at the time of the crimes. Mr. Van Cavage stated that he had reason to believe that Mr. Grim was incompetent at the time of the offense. Dr. B.R. Ogburn, M.D., conducted a psychiatric evaluation of Mr. Grim and reviewed various court documents. Dr. Ogburn concluded that, on the night of the 1982 offenses, Mr. Grim was intoxicated and succumbed to a loss of control as the result of emotional "triggering." Dr. Ogburn concluded that Mr. Grim was unable to form specific intent for the crimes. After Mr. Grim pleaded guilty, Mr. Van Cavage filed a motion to mitigate and wrote a sentencing letter to the judge regarding the circumstances of the offenses. Mr. Van Cavage stated that Mr. Grim's drinking and psychological issues may have been a contributing factor in his commission of the crimes, and recommended that Mr. Grim receive psychiatric counseling.

6. In my opinion, had I been called as a witness in a post-*Hurst v. Florida* proceeding to address the prior convictions aggravation and to assist the jury in understanding the nature, weight, and significance of the aggravation and making a determination whether the prior convictions are sufficient for a death

sentence, I would have explained that they were not substantial or significant in nature. Either I or a similarly qualified mental health expert could have expressed the opinion that the nature, weight, and significance of the priors, under all relevant circumstances, is not substantial or especially weighty in a capital sentencing context, an opinion that I hold. I would have assisted counsel in developing arguments for the jury that the jury should not rely on the priors as sufficiently weighty to justify a death sentence. I would have testified that Mr. Grim's psychological problems as well as his excessive use of alcohol and drugs to cope with his issues, appears, from the accounts of those who know Mr. Grim and from the records provided to me, to have played a contributing role in his prior felony offenses.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Jethro Toomer, Ph.D.

AFFIDAVIT/ DECLARATION OF MARK S. BOWDEN

PURSUANT TO 28 U.S.C. § 1746

STATE OF FLORIDA )

)

COUNTY OF ESCAMBIA )

I, Mark S. Bowden, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Mark Bowden. I have known Norman "Butch" Grim since tenth grade. We were best friends, basically brothers.

2. Butch had many problems, his relationship with his alcoholic, physically abusive biological father was a constant source of torment for him. His father beat both he and his mother. Even though his father treated him so deplorably he craved nothing more than his acceptance. In high school Butch fantasied about his parents getting back together. Butch dealt with his father's rejection by rebelling against him. His father was a Navy man and straight laced. Because he could never gain his father's approval Butch had very low self-esteem.

3. Relationships were very hard for Butch. Butch never had any girlfriends in high school. He craved loving relationships but was somehow incapable of achieving them. He was a broken person.

4. Butch was his own worst enemy. He was self-destructive. He couldn't control himself. Alcohol and drugs were a way for him to medicate himself. But his excessive use of alcohol and drugs exacerbated his problems.

5. Butch was an alcoholic. He was unable to control or even understand his actions while drinking.

6. Something was going on with Butch deep down. He had psychological problems that he dealt with by drinking. I saw Butch drunk or high on many occasions.

7. I was with Butch the night before and the morning of his September 1982 arrest for kidnapping and other charges. In fact, I had been out drinking with Butch to all hours of the night, and into the morning, on the previous two days. That night Butch and I were drinking at "Franco's" on Bayou Blvd. When the bar closed we continued to drink at an after hour bottle club called "Franco's All Night Affair" on 9th Avenue. We were at the bar until 4:00am or so. We were drinking hard liquor.

8. Butch was really drunk. I could tell based upon our conversation and his bizarre behavior that he was not straight or doing well. Butch was never vocal about his feelings, but he told me, that I was the best friend he ever had – the only friend. Then Butch for some unknown reason became

obsessed with how fat Randy Turner of Bachman Turner Overdrive had become. He wouldn't let it go.

9. That morning at the bottle club Butch attempted to pick-up an African American woman. When she left with another guy, Butch got really upset, strangely upset. I had never seen Butch get so upset over a girl. It just didn't make sense. His behavior was really bizarre, even for Butch. He just wasn't making any sense.

10. I drove Butch to his mother's house where he was staying. Butch asked me if I wanted to hang out and drink more. I was so exhausted from the previous two evenings that I told Butch I needed to get some sleep. I left Butch, who was very drunk, to sleep it off. Later that morning I received call from Butch's sister telling me the police were looking for him.

11. There is no way that Butch would have tried to abduct anyone if not for being so crazy drunk and not in his right mind.

12. As far as I know, every time Butch has been arrested it has been alcohol related. All of Butch's poor decisions seem to be alcohol related. Even just before Butch went to Texas to work, he got drunk and wrapped his Camaro around a telephone poll or tree.

13. I was never contacted by Butch's trial counsel. If so I would have provided this information and testified on his behalf.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Mark S. Bowden

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 19th day of October, 2016, by Mark S. Bowden, who is personally known to me or has produced the following identification: FL: B350-557-60-134-0

Notary Public, State of Florida

DANIEL J. ASHTON
Commission # FF 071854
Expires March 20, 2018
Bonded Thru TroyFain Insurance 800-385-7019

STATE OF FLORIDA )
) ss
COUNTY OF ESCAMBIA )

**Affidavit of Ronald Horton**

I, Ronald Horton, declare on this 6th day of October, 2016, and pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct:

1. My name is Ronald Horton, I live in Pensacola, Florida. I met Butch Grim when he and I worked together on a crew in Pensacola back in the 1990s. We'd worked together about four or five months before our supervisor asked the good workers, like Butch and me, if we wanted to go to Texas on another job. Butch and I were codefendants in the 1990 burglary case in Bell County, Texas. I am now aware that Butch was on probation for this charge when he was arrested for murder in 1998.
2. I remember Butch as a quiet guy at work. He worked alone and kept to himself. But that all changed when he was drinking. Butch drank Busch beer, by the case, and then he'd drink rum and Cokes and smoke pot on top of that. He was an alcoholic, with a serious drinking problem that he could not control. While I was a drinker, too. Butch's drinking was more serious. He seemed to need it.
3. When Butch had a bunch of money, he would drink more and get totally

messed up. He was a bottom of the bottle drunk. He was a red-haired and blue-eyed stocky, little drunk who lost control the more he drank.

4. The night before we left for Texas, Butch got drunk and passed out while he was driving and totaled his Camaro into a lamp post or a tree.
5. After we got down to Texas on Christmas Eve 1990, we went out to a bar. We had been drinking and smoking at the motel. It was a cold night, and it had snowed. It was a serious drinking night. Even when we started playing pool at the bar, Butch was already drunk.
6. After we left, we decided to check out the boat landing to see the icicles from the cold snap. I drove a Mustang Cobra with a bad front tire. On the way back from the boat landing, I needed to take a leak. I also needed new tires for my car. As I told the police, I saw a Pinto which I believed had the right-sized tires that I needed. My plan was to steal them. We pulled into the parking lot of an auto shop and I went in the dark to pee. Butch jumped out of the car like he had to pee too.
7. The next thing I knew, we were stealing tools from the garage. This was totally unplanned. It was just stupid drunken behavior by both of us.
8. The next morning, we were thinking "oh shit, we did this. What have we done?" This never would have happened if we had not been drunk. We both got busted for the burglary. I got 3 years. This was all just a terrible

mistake which hurt my family greatly.

9. I feel sorry for Butch. He was a bad drunk, and couldn't handle it well. He was an alcoholic. He got into a bad situation he never would have gotten into if he had not been drinking so much.

10. I have never been contacted by any attorneys or investigators from Florida representing Butch. I didn't even know that Butch was sentenced to death. If contacted I would have assisted and made myself available.

10-6-16 Ronald L. Horton

Ronald Horton

Sworn or affirmed before me this 6th day of October, 2016. Affiant, Ronald Horton, is personally known to me.

Notary Public

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA
DANIEL J. ASHTON
Commission # FF 071854
Expires March 20, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

DECLARATION OF KATHY SMITH

PURSUANT TO 28 U.S.C. § 1746

1. My name is Kathy Smith. I currently reside in Georgia. In the fall of 1981, my sister Charlotte May introduced me to Sharon Clough and two Navy sailors named Norman Grim AKA Butch and Charles Raab. In September of 1981, the five of us were involved in robbing a convenience store in Mayport, FL.

2. I only knew Norman and Charles for about a month before the robbery. I thought Norman was very immature for his age. I thought I was older than him and was shocked when I found out he was 20. Norman and Charles may have had motorcycles, but they were not men. They were immature boys and often drunk.

3. I hung out with Sharon, Charlotte, Norman and Charles quite a bit. They were drinking and smoking marijuana daily. On the night of the robbery, Charlotte, Sharon, Norman and Charles were drinking and it was clear they were using other drugs. I could tell they were all intoxicated. The guys would have been using Quaaludes and acid during this time period too. If not for being drunk and high, the robbery would not have happened.

4. The robbery its self was stupid and immature. We were just stupid kids who made a rash decision. We took beer and cigarettes from the store. There were no guns used.

5. Sharon seemed like the mastermind behind everything we did. Shortly after the robbery, we all left to go to Maine. We stayed at Sharon's parents' house. Within two weeks, I hitchhiked back to Florida because Sharon and I had a disagreement. Sharon was very manipulative.

6. I have just now learned that Norman is serving a death sentence. It saddens me to know that the robbery that I was involved in with Norman was used by the prosecution as a factor in requesting the jury and judge sentence him to death. If asked by his trial counsel I would have told them this information. I would have been willing to testify and would have explained that this whole thing was the stupid and immature behavior of young people under the influence.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Kathy Smith

Kathy Smith

10/15/16

Date

DECLARATION OF CHARLOTTE L. MAY

PURSUANT TO 28 U.S.C. § 1746

- My name is Charlotte L. May, I currently reside in California. In the fall of 1981, my sister Kathy and I became acquainted with Norman Mearle Grim, Jr. and Charles Raab. Norman went by Butch. Charles Raab was dating Sharon Clough. Sharon was friends with my sister and me. In September of 1981 the five of us were involved in robbing a convenience store in Duval County, FL.

- I only knew Butch and Raab for a month or so. During the two to three weeks prior to the robbery Butch was drinking and smoking pot daily. We all were. Butch was drinking as much beer as he could get his hands on. It was during one of these binges that we robbed the convenience store. If not for being drunk the robbery would not have happened.

- The robbery its self was stupid and immature. We were just dumb kids who made a very a poor decision. The robbery took place at a convenience store across the street from the trailer park Sharon lived at. There were no guns. No one was supposed to nor did anyone get hurt. Basically we just walked into the store and took money and beer. It was a drunk prank by stupid kids more than a robbery.

- My sister and I looked up to Sharon. We were both young and Sharon seemed so mature.

She carried herself like a badass biker chick. Sharon always got her way. That was just the way it was. Sharon was the catalyst for everything we did. She was the reason we ended up in Maine. After the robbery and getting to Maine Sharon began to show her true colors. She was very manipulative and only cared about herself. She would do anything to advance her own agenda.

- I have just now learned that Butch has been sentenced to death. I'm sad that the robbery that I was involved in with Butch was used by the prosecution as a factor in requesting the jury and judge sentence him to death. If asked by his trial counsel I would have provided them this information. I would have been willing to testify and would have explained that this whole thing was the stupid and immature behavior of young people who had been drinking too much.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Charlotte May

**Charlotte L. May**

10/12/10

DECLARATATION OF CHARLES JOSEPH RAAB

PURSUANT TO 28 U.S.C. § 1746

1. My name is Charlie Raab. In September of 1981 Norman "Butch" Grim and I were in the Navy and stationed together in Mayport, FL. Later in 1981 we were convicted as co-defendants on an unarmed robbery charge in Duval County, FL. Also involved in the robbery were Sharon Clough and Kathy and Charlotte May.

2. Butch and I originally met at A – School at the Navy base in Virginia Beach. We were reunited when we were stationed in Mayport, FL. At Mayport, Butch and I would drink every night during the week. On the weekends we drank even more, and we would get stupid drunk. Butch was immature and he was an alcoholic.

3. In September of 1981, I was dating Sharon Clough. Sharon was friends with Charlotte and Kathy May. Charlotte was a head turner who had a way about her. She had Butch wrapped around her fingers. Butch would have done anything for Charlotte.

4. Butch and I went to see Charlotte and Sharon. The four of us, along with Charlotte's sister Kathy, started binging and just didn't stop binging until we were arrested in Maine. We drank and kept drinking for about four weeks straight.

5. At the start, Butch and I had about five hundred dollars each. It didn't take long to blow through that money. We were drinking hard. Butch was drinking beer by the case and whiskey by the bottle. When he was awake, Butch was drinking until he passed out. When he woke up,

he started drinking again. Butch drank more in that three to four week time span than most drinkers would consume in a year. I'm surprise that he didn't die from alcohol poisoning.

6. When the money ran out, Sharon made it clear that the party was going to continue with or without Butch and me. It was on us to get more money. Sharon was demanding that I get enough money to move her back to Maine or she would find a man that could. She made clear that she was taking Charlotte and Kathy with her and that we would never see them again. I was in love. I didn't want to see her go. I even sold my motorcycle prior to going to Maine so I would have some money left when we got there to start our lives together.

7. Robbing the convenience store was Sharon's idea. She used to work at that store. Her idea, if you could call it that, was to steal from the place right before it closed. We were all drunk. We ran into the store, and stole a lot of beer and cigarettes. No one had guns or knives. No one got hurt. It was just a stupid drunken mistake.

8. After the robbery the five of us headed to Maine. We weren't in Maine for two weeks before we were apprehended. Butch and I were brought to a base in Maine. I recall talking to Butch at the base in Maine after I sobered up. Neither of us could explain nor wrap our minds around what we had done. It defied logic. If not for the crazy amount of drinking this would have never happened.

9. I lost contact with Butch after being discharged from the Navy and leaving Florida. I had no idea that he had been charged in a murder or sentenced to death. If contacted by his attorneys I would have provided them with the above information and testified if requested to

do so. I would have explained what happened with this crime and Butch. I also would have testified, if asked, that Butch should not be sentenced to a death penalty.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Charles Joseph Raab

Charles Joseph Raab

10/18/16

Date

DECLARATION OF VICTORIA LYNN McKEE

PURSUANT TO 28 U.S.C. § 1746

1. My name is Victoria "Pike" McKee, I now reside in California. In September of 1982, I lived in Escambia County, Florida.

2. Norman Grim was charged with burglary and aggravated battery as a result of him breaking into my residence. I recall that he pled guilty.

3. I became aware at some point that Norman Grim had been charged with murder. At the time I was living in Alaska. I spoke briefly with someone by phone. I don't recall the details of the conversation. I do not recall being asked my opinion on the death penalty.

4. I am against the death penalty. If asked, I would have been against death penalty for Mr. Grim in 1998, especially in light of Mr. Grim's mental health issues. If contacted by defense counsel I would have made these views known.

5. I do not wish to see Norman Grim executed.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Victoria McKee

Victoria Lynn McKee

10-13-16

**DECLARATION OF NONA SIMMONS YOUNG.**

**PURSUANT TO 28 U.S.C § 1746**

1. My name is Nona Young, I currently reside in Dakota County, Minnesota. In September of 1982, I lived in Pensacola, FL. I worked as a radio personality and also for WSRE –Television.

2. Norman Grim was charged with attempting to kidnap me. I recall that he was wearing nothing but shorts and his hair was windblown. He was a mess, didn't look right and his eyes were strange.

3. I was in contact with the police and followed the case through sentencing. I am aware of the bizarre circumstances surrounding other crimes he committed that day. They did not appear to me to be planned. I attended his sentencing. I recall that the judge sentenced him to psychiatric counseling.

4. In 1998, I was working in the news room of the NBC affiliate in Mobile, AL. I was in the news room when the story broke that the police were looking for Norman Grim in connection to a murder. At some point in the following year or so I was contacted by a female lawyer from the Office of the State Attorney. I was told that the State of Florida was seeking the death penalty against Norman Grim. I was asked my opinion on the death penalty and if I was willing to testify for the State. I told the prosecutor that I did not want to be in anyway responsible for assisting in Norman Grim being sentenced to death. I did not hear from the State Attorney's Office again.

5. I did not wish for Mr. Grim to be sentenced to death in 1998 and I do not wish for him to be sentenced to death now. I was never contacted by Mr. Grim's trial counsel. If I had been I would have provided all of this information.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Nona Simmons Young

Date: 10/17/16

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

To File Rec'd 4/25/83

STATE OF FLORIDA,
Plaintiff,
vs. Case Nos. 82-4213 - 82-4216, 82-4201, 82-4200
NORMAN GRIM,
Defendant.

MOTION TO MITIGATE

COMES NOW the Defendant, NORMAN GRIM, by and through his undersigned attorney and hereby moves this Honorable Court to mitigate his sentence pursuant to Fla.R.Crim.P. 9.800, and as grounds, the Defendant would show.

1. That on March 16, 1983 the Defendant was sentenced to 25 years in prison.

2. That the Defendant, Norman Grim, is twenty-two years old and prior to his present sentence of 25 years being imposed he had never been sentenced to any prison time.

3. That he presently possesses a very positive and constructive attitude about what may have caused him to behave in the way he did on September 9, 1982 and also about what he can do to assure society and himself that he will never again violate the law.

4. This attorney has been in contact with Dr. Ogburn who has indicated to me that with psychiatric help and counselling coupled with a period of incarceration as punishment, that Norman Grim could function and work as a productive and honorable member of society in the future.

5. That Norman Grim has been incarcerated since September 9, 1982 in the Escambia County Jail and has not had any problems with the jail officials and has exhibited the ability to function properly within the jail system, which I believe indicates that he can, with the aforementioned counselling and rehabilitative punishment, also function in society.

6. It is my belief, that given his present positive attitude, his young age, and his willingness to accept counselling and whatever treatment is determined necessary to maintain proper behavior patterns, that the 25 year sentence which was imposed upon him should be reduced to a period of time which would have the same effect but not keep him locked up for most of his adult years.

WHEREFORE, the Defendant, through his undersigned attorney respectfully requests this Honorable Court to mitigate his sentence.

* * * * *

NOTICE OF HEARING

TO: Robert Heath
Assistant State Attorney

YOU ARE HEREBY notified that the foregoing motion will be brought on for hearing on May 12, 1983 at 4:30 p.m. before Judge William Anderson.

PLEASE BE GOVERNED ACCORDINGLY.

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was hand delivered to the Office of the State Attorney, 190 Governmental Center, Pensacola, Florida, this the 22nd day of April, 1983.

JACK BEHR
PUBLIC DEFENDER

MICHAEL A. VAN CAVAGE
ASSISTANT PUBLIC DEFENDER
190 GOVERNMENTAL CENTER
PENSACOLA, FLORIDA
ATTORNEY FOR THE DEFENDANT

Robert Nash

# Office of the Public Defender

## First Judicial Circuit

Escambia County Judicial Center
P.O. Box 12666
Pensacola, Florida 32574

JACK BEHR
Public Defender

(904) 436-5400

TERRY TERRELL
Chief Assistant

March 15, 1983

RECEIVED
MAR
State Attorney's Office

The Honorable William H. Anderson
Circuit Court Judge
190 Governmental Center
Pensacola, Florida 32501

RE: Norman Grim
Case Nos. 82-4200, 82-4201,
82-4213, 82-4214, 82-4215,
82-4216

Dear Judge Anderson:

The defendant pled guilty on February 9, 1983 to all counts contained within all cases pending against him. The State Attorney's Office had offered a plea bargain for Norman to plea to twenty-five years in prison concurrent on all charges.

Norman Grim is 22 years of age and has exhibited to this attorney a very positive attitude about his present situation. His memory of the events on September 9, 1982 is faulty but he does realize that he committed the crimes he is accused of and that he will be punished for these acts. He is at a loss to explain his behavior and desirous of receiving psychiatric counselling and guidance so that he may avoid any further criminal acts. He has come across to this attorney as an intelligent and sensitive young man, who for reasons I do not understand and I do not believe the defendant fully understands, acted in an irrational and dangerous manner on September 9, 1982. I do not believe that Norman was acting maliciously when he committed these acts. Norman's normal personality is that of a shy, diffident young man who at least in personal conversations exhibits no hostility towards no one and as stated appears to be baffled and confused about his behavior on September 9, 1982. While there is no excuse for his behavior, it should be noted that he had been drinking for most of the night and this may have attributed to his initial aberrant behavior.

I feel as Dr. Ogburn feels that Norman probably, while aware of what he was doing and aware that it was wrong, was not at that time capable of forming the specific intent to commit these crimes. His behavior during this period seemed to have no purpose and no direction. After the initial incident with Nona Young his behavior is indicative of his irrationality. While the Presentence Investigation lays out the facts of his behavior after the initial incident with Nona Young, I feel it indicates that Norman Grim was not acting in a purposeful manner at that time.

I would ask this Honorable Court when reviewing the charges and the evidence against Norman Grim to remember that his aberrant behavior of that day is not an indication of the type of person Norman Grim is but merely an anomaly, and, as stated, is not truly characteristic of the defendant. I would ask this Honorable Court to be as lenient as possible when considering all the facts, the defendant's age, his present positive attitude, and Dr. Ogburn's report which indicates that the most important thing is that Norman Grim recieve psychiatric help.

Sincerely,

Michael A. Van Cavage
Assistant Public Defender

Enclosure

cc: Robert Heath
Assistant State Attorney

Redacted:
Psychiatric Evaluation of Norman Grim
Dr. B. R. Ogburn, M.D.
July 1983

CURTIS A. GOLDEN
STATE ATTORNEY
First Judicial Circuit of Florida

Please reply to:
Pensacola Office

October 7, 1982

Honorable William H. Anderson
Judge, Circuit Court
190 Governmental Center
Pensacola, Florida 32501

Re: State v. Norman Grim
Case No. 82-4200, 82-4201,
82-4213 - 82-4216

Dear Judge Anderson:

Enclosed please find a motion and order for appointment of expert in the above-styled cases. I have no objection to the motion and order but would like to request that Dr. Benjamin Ogburn be appointed as one of the two experts to examine the defendant.

By copy of this letter I am requesting Mr. Van Cavage to advise the court if he has any objections to Dr. Ogburn.

Very truly yours,

Robert N. Heath, Jr.
Assistant State Attorney

RNHJr/sg

Enclosures

cc: Michael A. Van Cavage, Esquire

ESCAMBIA COUNTY
Post Office Box 12726
190 Governmental Center
Pensacola, Florida 32501
Felony & Intake - 438-5300
Misdemeanor - 438-5300
Grand Jury - 438-5300

SANTA ROSA COUNTY
Courthouse Second Floor
Post Office Box 645
Milton, Florida 32570
623-7756 & 994-5063

OKALOOSA COUNTY
Cedar Street
Post Office Box 917
Crestview, Florida 32536
682-6151
Courthouse Annex
Shalimar, Florida 32579

WALTON COUNTY
211 East Nelson St
Post Office Box 630
DeFuniak Springs, FL 32433
892-8122

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.
NORMAN GRIM,
Defendant.

CASE NOS. 82-4200, 82-4201, 82-4213 - 82-4216

ORDER APPOINTING EXPERTS

THIS CAUSE coming before the Court, upon the Motion of the Defendant to appoints experts, and the Court having been fully advised in the matter, is is hereby

ORDERED AND ADJUDGED that Dr. Benjamin and Dr. Ogburn is are hereby appointed to examine the Defendant in order to assist the attorney for the Defendant prepare for defense. They shall report only to the attorney for the Defendant in matters related to their consultation with the Defendant and opinions shall be deemed to fall under the lawyer-client privilege.

DONE AND ORDERED this the 8th day of October, 1982, at Pensacola, Escambia County, Florida.

(SIGNED) WILLIAM H. ANDERSON
CIRCUIT COURT JUDGE

cc: Office of the State Attorney
Office of the Public Defender
_____, Appt. Expert
_____, Appt. Expert

RECEIVED
OCT 18 1982
STATE ATTORNEY

# EXHIBIT 10

## Florida Death-Penalty Appeals Decided in Light of Hurst

**Last updated: May 15, 2018**

**Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 259**

**Number of prisoners who have obtained relief under *Hurst*: 128 (49.42%)**

**Number of prisoners who have been denied relief under *Hurst*: 131 (50.58%)**

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendations of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Abdool, Dane | Orange | N | N | 10-2 | Y | 4/6/17 |
| Allred, Andrew | Seminole | N | WAIVED JURY | | N | 11/16/17 |
| Alston, Pressley Bernard | Duval | Y | N | 9-3 | N | 1/22/18 |
| Altersberger, Joshua Lee | Highlands | N | N | 9-3 | Y | 4/27/17 |
| Anderson, Charles L. | Broward | N | N | 8-4 | Y | 3/9/17 |
| Anderson, Richard | Hillsborough | Y | N | 11-1 | N | 1/26/18 |
| Archer, Robin Lee | Escambia | Y | N | 7-5 | N | 3/17/17 |
| Armstrong, Lancelot Uriley | Broward | N | N | 9-3 | Y | 1/19/17 |
| Asay, Marc | Duval | Y | N | 9-3, 9-3 | N (**EXECUTED**) | 12/22/16 |
| Atwater, Jeffrey Lee | Pinellas | Y | N | 11-1 | N | 1/23/18 |
| Ault, Howard Steven | Broward | N | N | 9-3, 10-2 | Y | 3/9/17 |
| Bailey, Robert J. | Bay | N | N | 11-1 | Y | 7/6/17 |
| Baker, Cornelius | Flagler | N | N | 9-3 | Y | 3/23/17 |
| Banks, Donald | Duval | N | N | 10-2 | Y | 4/20/17 |
| Bargo, Michael Shane | Marion | N | N | 10-2 | Y | 6/29/17 |
| Barnhill, Arthur | Seminole | N | N | 9-3 | Y | 2/20/17 |
| Barwick, Darryl Brian | Bay | Y | Y | 12-0 | N | 2/28/18 |
| Bates, Kayle Barrington | Bay | Y | N | 9-3 | N | 1/22/18 |
| Beasley, Curtis W. | Polk | Y | N | 10-2 | N | 1/23/18 |
| Belcher, James | Duval | N | N | 9-3 | Y | 11/2/17 |
| Bell, Michael | Duval | Y | Y | 12-0, 12-0 | N | 1/29/18 |
| Bevel, Thomas | Duval | N | N | 8-4, 12-0 | Y* | 6/15/17 |
| Booker, Stephen Todd | Duval | Y | N | 8-4 | N | 1/30/18 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Bowles, Gary Ray | Duval | Y | Y | 12-0 | N | 1/29/18 |
| Braddy, Harrel | Miami-Dade | N | N | 11-1 | Y | 6/15/17 |
| Bradley, Brandon Lee | Brevard | N | N | 10-2 | Y | 3/30/17 |
| Bradley, Donald | Clay | Y | N | 10-2 | N | 1/22/18 |
| Branch, Eric Scott | Escambia | Y | N | 10-2 | N **(EXECUTED)** | 1/22/18 |
| Brookins, Elijah | Gadsden | N | N | 10-2 | Y | 4/20/17 |
| Brooks, Lamar | Okaloosa | N | N | 9-3, 11-1 | Y | 3/10/17 |
| Brown, Paul Alfred | Hillsborough | Y | N | 7-5 | N | 1/29/18 |
| Brown, Paul Anthony | Volusia | Y | Y | 12-0 | N | 2/28/18 |
| Burns, Daniel Jr. | Manatee | Y | Y | 12-0 | N | 1/23/18 |
| Buzia, John | Seminole | N | N | 8-4 | Y | 4/6/17 |
| Byrd, Milford Wade | Hillsborough | Y | Unknown | Unknown | N | 2/28/18 |
| Calloway, Tavares David | Miami-Dade | N | N | 7-5, 7-5, 7-5, 7-5, 7-5 | Y | 1/26/17 |
| Campbell, John | Citrus | N | N | 8-4 | Y | 8/30/17 |
| Card, James | Bay | N | N | 11-1 | Y | 5/4/17 |
| Carr, Emilia | Marion | N | N | 7-5 | Y | 2/7/17 |
| Carter, Pinkney | Duval | N | N | 9-3, 8-4 | Y | 10/4//17 |
| Caylor, Matthew | Bay | N | N | 8-4 | Y | 5/18/17 |
| Clark, Ronald Wayne Jr. | Duval | Y | N | 11-1 | N | 1/23/18 |
| Cole, Loran | Marion | Y | Y | 12-0 | N | 1/23/18 |
| Cole, Tiffany Ann | Duval | N | N | 9-3, 9-3 | Y | 6/29/17 |
| Conde, Rory | Miami-Dade | N | N | 9-3 | Y | 8/31/17 |
| Consalvo, Robert | Broward | Y | N | 11-1 | N | 1/31/18 |
| Cox, Allen | Lake | N | N | 10-2 | Y | 7/23/17 |
| Cozzie, Steven Anthony | Walton | N | Y | 12-0 | N | 5/11/17 |
| Crain, Willie Seth | Hillsborough | N | Y | 12-0 | N | 4/5/18 |
| Damren, Floyd William | Clay | Y | Y | 12-0 | N | 2/2/18 |
| Darling, Dolan a/k/a Sean Smith | Orange | N | N | 11-1 | Y | 3/29/17 |
| Davis, Adam W. | Hillsborough | N | N | 7-5 | Y | 5/2/17 |
| Davis, Barry T. | Walton | N | N | 9-3, 10-2 | Y | 5/11/17 |
| Davis, Jr., Leon | Polk | N | Y | 12-0, 12-0, 8-4 | N | 11/10/16 |
| Davis, Jr., Leon | Polk | N | WAIVED JURY | | N | 11/10/16 |
| Davis, Mark Allen | Pinellas | Y | N | 8-4 | N | 1/29/18 |
| Davis, Toney D. | Duval | Y | N | 11-1 | N | 2/17/17 |
| Dennis, Labrant | Miami-Dade | N | N | 11-1, 11-1 | Y | 7/7/17 |
| Deparvine, Williams James | Hillsborough | N | N | 8-4, 8-4 | Y | 4/6/17 |
| Derrick, Samuel Jason | Pasco | Y | N | 7-5 | N | 2/2/18 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Dessaure, Kenneth | Pinellas | N | WAIVED JURY | | N | 11/16/17 |
| Deviney, Randall | Duval | N | N | 8-4 | Y | 3/23/17 |
| Diaz, Joel | Lee | N | N | 9-3 | Y | 6/15/17 |
| Dillbeck, Donald David | Leon | Y | N | 8-4 | N | 1/24/18 |
| Doorbal, Noel | Miami-Dade | N | N | 8-4, 8-4 | Y | 9/20/17 |
| Doty, Wayne | Bradford | N | N | 10-2 | Y | 8/7/17 |
| Douglas, Luther | Duval | N | N | 11-1 | Y | 6/29/17 |
| Dubose, Rasheem | Duval | N | N | 8-4 | Y | 2/9/17 |
| Durousseau, Paul | Duval | N | N | 10-2 | Y | 1/31/17 |
| Eaglin, Dwight | Charlotte | N | N | 8-4, 8-4 | Y | 4/3/17 |
| England, Richard | Volusia | N | N | 8-4 | Y | 5/22/17 |
| Evans, Paul H. | Indian River | N | N | 9-3 | Y | 3/20/17 |
| Evans, Steven Maurice | Orange | Y | N | 11-1 | N | 1/24/18 |
| Evans, Wydell Jody | Brevard | N | N | 10-2 | Y | |
| Finney, Charles | Hillsborough | Y | N | 9-3 | N | 1/26/18 |
| Floyd, Maurice Lamar | Putnam | N | N | 11-1 | Y | 5/17/17 |
| Ford, James D. | Charlotte | Y | N | 11-1, 11-1 | N | 1/23/18 |
| Foster, Charles | Bay | Y | N | 8-4 | N | 1/29/18 |
| Foster, Kevin Don | Lee | Y | N | 9-3 | N | 1/29/18 |
| Fotopoulos, Konstantinos | Volusia | Y | N | 8-4, 8-4 | N | 1/29/18 |
| Frances, David | Orange | N | N | 9-3, 10-2 | Y | 3/29/17 |
| Franklin, Richard P. | Columbia | N | N | 9-3 | Y | 11/23/16 |
| Gamble, Guy R. | Lake | Y | N | 10-2 | N | 1/29/18 |
| Gaskin, Louis | Flagler | Y | N | 8-4, 8-4 | N | 2/28/18 |
| Geralds, Mark Allen | Bay | Y | Y | 12-0 | N | 2/28/18 |
| Glover, Dennis T. | Duval | N | N | 10-2 | Y | 9/14/17 |
| Gonzalez, Leonard | Escambia | N | N | 10-2 | Y | 5/23/17 |
| Gonzalez, Ricardo | Miami-Dade | Y | N | 8-4 | N | 3/23/18 |
| Gordon, Robert R. | Pinellas | Y | N | 9-3 | N | 1/31/18 |
| Gregory, William | Volusia | N | N | 7-5, 7-5 | Y | 8/31/17 |
| Griffin, Michael Allen | Miami-Dade | Y | N | 10-2 | N | 2/2/18 |
| Grim, Norman | Santa Rosa | N | Y | 12-0 | N | 3/29/18 |
| Guardado, Jesse | Walton | N | Y | 12-0 | N | 5/11/17 |
| Gudinas, Thomas Lee | Collier | Y | N | 10-2 | N | 1/30/18 |
| Guzman, James | Volusia | N | N | 11-1 | Y | 2/22/18 |
| Guzman, Victor | Miami-Dade | N | N | 7-5 | Y | 4/6/17 |
| Hall, Donte Jermaine | Lake | N | N | 8-4 | Y | 6/15/17 |
| Hall, Enoch D. | Volusia | N | Y | 12-0 | N | 2/9/17 |
| Hamilton, Richard | Hamilton | Y | N | 10-2 | N | 2/18/18 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Hampton, John | Pinellas | N | N | 9-3 | Y | 5/4/17 |
| Hannon, Patrick | Hillsborough | Y | Y | 12-0 | N **(EXECUTED)** | 11/1/17 |
| Hartley, Kenneth | Duval | Y | N | 9-3 | N | 1/26/18 |
| Hayward, Steven | St. Lucie | N | N | 8-4 | Y | 3/24/17 |
| Heath, Ronald Palmer | Alachua | Y | N | 10-2 | N | 2/28/18 |
| Hernandez, Michael | Santa Rosa | N | N | 11-1 | Y | 5/11/17 |
| Hernandez-Alberto, Pedro | Hillsborough | N | N | 10-2, 10-2 | Y | 5/9/17 |
| Hertz, Gerry | Wakulla | N | N | 10-2, 10-2 | Y | 5/18/17 |
| Heyne, Justin | Brevard | N | N | 10-2, 8-4 | Y | 4/6/17 |
| Hitchcock, James | Orange | Y | N | 10-2 | N | 8/10/17 |
| Hobart, Robert | Santa Rosa | N | N | 7-5 | Y | 2/21/18 |
| Hodges, George Michael | Hillsborough | Y | N | 10-2 | N | 2/2/18 |
| Hodges, Willie James | Escambia | N | N | 10-2 | Y | 3/16/17 |
| Hojan, Gerhard | Broward | N | N | 9-3, 9-3 | Y | 1/31/17 |
| Huggins, John | Orange | N | N | 9-3 | Y | 5/23/17 |
| Hunter, Jerone | Volusia | N | N | 10-2, 10-2, 9-3, 9-3 | Y | 6/16/17 |
| Hurst, Timothy | Escambia | N | N | 7-5 | Y | 10/14/16 |
| Hutchinson, Jeffrey | Okaloosa | N | WAIVED JURY | WAIVED JURY | N | 3/15/18 |
| Israel, Connie Ray | Duval | N | N | 7-5 | Y | 3/21/17 |
| Jackson, Etheria Verdell | Duval | Y | N | 7-5 | N | 1/24/18 |
| Jackson, Kenneth R. | Hillsborough | N | N | 11-1 | Y | 3/23/17 |
| Jackson, Michael James | Duval | N | N | 8-4, 8-4 | Y | 6/9/17 |
| Jackson, Ray | Volusia | N | N | 9-3 | Y | 4/24/17 |
| Jeffries, Kevin G. | Bay | N | N | 10-2 | Y | 7/13/17 |
| Jeffries, Sonny Ray | Orange | Y | N | 11-1 | N | 1/26/18 |
| Jennings, Brandy Bain | Collier | Y | N | 10-2, 10-2, 10-2 | N | 1/29/18 |
| Johnson, Emanuel | Sarasota | Y | N | 8-4, 10-2 | N | 2/2/18 |
| Johnson, Paul Beasley | Polk | N | N | 11-1, 11-1, 11-1 | Y | 12/1/16 |
| Johnson, Richard Allen | St. Lucie | N | N | 11-1 | Y | 3/24/17 |
| Johnson, Ronnie | Miami-Dade | Y | N | 7-5, 9-3 | N | 3/27/18 |
| Johnston, Ray | Hillsborough | N | N | 11-1 | Y | 7/21/17 |
| Johnston, Ray | Hillsborough | N | Y | 12-0 | N | 7/21/17 |
| Jones, Henry Lee | Brevard | N | Y | 12-0 | N | 3/2/17 |
| Jones, Marvin Burnett | Duval | Y | N | 9-3 | N | 1/22/18 |
| Jones, Victor | Miami-Dade | Y | Y/N | 10-2, 12-0 | N | 9/28/17 |
| Jordan, Joseph | Volusia | N | N | 10-2 | Y | 8/22/17 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Kaczmar, III, Leo L. | Clay | N | Y | 12-0 | N | 1/31/17 |
| Kelley, William H. | Highlands | Y | N | 8-3 [not a typo] | N | 1/26/18 |
| King, Cecil | Duval | N | N | 8-4 | Y | 7/12/17 |
| King, Michael L. | Sarasota | N | Y | 12-0 | N | 1/26/17 |
| Kirkman, Vahtiece | Brevard | N | Y | 10-2 | Y | 1/11/18 |
| Knight, Richard | Broward | N | Y | 12-0, 12-0 | N | 1/31/17 |
| Kocaker, Genghis | Pinellas | N | N | 11-1 | Y | 10/6/17 |
| Kokal, Gregory Alan | Duval | Y | Y | 12-0 | N | 1/24/18 |
| Kopsho, William M. | Marion | N | N | 10-2 | Y | 1/19/17 |
| Krawczuk, Anton | Duval | Y | Y | 12-0 | N | 1/31/18 |
| Lamarca, Anthony | Pinellas | Y | N | 11-1 | N | 1/30/18 |
| Lambrix, Cary Michael | Glades | Y | N | 8-4, 10-2 | N **(EXECUTED)** | 9/29/17 |
| Lawrence, Gary | Santa Rosa | Y | N | 9-3 | N | 2/2/18 |
| Lebron, Joel | Osceola | N | N | 7-5 | Y | 4/20/17 |
| Lightbourne, Ian | Marion | Y | N | Unrecorded | N | 1/26/18 |
| Long, Robert Joe | Hillsborough | Y | Y | 12-0 | N | 1/29/18 |
| Lucas, Harold Gene | Lee | Y | N | 11-1 | N | 1/24/18 |
| Marquard, John | St. Johns | Y | Y | 12-0 | N | 1/24/18 |
| Martin, David | Clay | N | N | 9-3 | Y | 7/13/17 |
| Matthews, Douglas | Volusia | N | N | 10-2 | Y | 12/5/17 |
| McCoy, Richard (aka Jamil Rashid) | Duval | N | N | 7-5 | Y | 9/6/17 |
| McCoy, Thomas | Walton | N | N | 11-1 | Y | 11/8/17 |
| McGirth, Renaldo Devon | Marion | N | N | 11-1 | Y | 1/26/17 |
| McKenzie, Norman Blake | St. Johns | N | N | 10-2, 10-2 | Y | 6/19/17 |
| McLean, Derrick | Orange | N | N | 9-3 | Y | 4/24/17 |
| McMillian, Justin | Duval | N | N | 10-2 | Y | 4/13/17 |
| Melton, Antonio Lebaron | Escambia | Y | N | 8-4 | N | 2/2/18 |
| Mendoza, Marbel | Miami-Dade | Y | N | 7-5 | N | 1/30/18 |
| Merck, Jr., Troy | Pinellas | N | N | 9-3 | Y | 5/5/17 |
| Middleton, Dale | Okeechobee | N | Y | 12-0 | N | 3/9/17 |
| Miller, David Jr. | Duval | Y | N | 7-5 | N | 1/31/18 |
| Miller, Lionel Michael | Orange | N | N | 11-1 | Y | 5/8/17 |
| Morton, Alvin | Pasco | Y | N | 11-1, 11-1 | N | 2/2/18 |
| Morris, Dontae | Hillsborough | N | Y | 12-0, 12-0 | N | 4/27/17 |
| Morris, Dontae | Hillsborough | N | N | 10-2 | Y | 1/11/18 |
| Morris, Robert D. | Polk | Y | N | 8-4 | N | 1/26/18 |
| Mosley, John F. | Duval | N | N | 8-4 | Y | 12/22/16 |
| Mullens, Khadafy | Pinellas | N | WAIVED JURY | | N | 6/16/16 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Murray, Gerald Delane | Duval | N | N | 11-1 | Y | 4/4/17 |
| Nelson, Joshua D. | Lee | Y | Y | 12-0 | N | 1/31/18 |
| Nelson, Micah | Polk | N | N | 9-3 | Y | 3/8/17 |
| Newberry, Rodney | Duval | N | N | 8-4 | Y | 4/6/17 |
| Oats, Jr. Sonny Boy | Marion | Y | UNKNOWN | | N | 5/25/17 |
| Occhicone, Dominick A. | Pasco | Y | N | 7-5 | N | 1/30/18 |
| Okafor, Bessman | Orange | N | N | 11-1 | Y | 6/8/17 |
| Oliver, Terence Tabius | Brevard | N | Y | 12-0, 12-0 | N | 4/6/17 |
| Orme, Roderick | Bay | N | N | 11-1 | Y | 3/30/17 |
| Overton, Thomas M. | Monroe | Y | N | 8-4, 9-3 | N | 2/2/18 |
| Pace, Bruce Douglas | Santa Rosa | Y | N | 7-5 | N | 1/30/18 |
| Pagan, Alex | Broward | N | N | 7-5, 7-5 | Y | 2/1/18 |
| Parker, J.B. | Martin | N | N | 11-1 | Y | 4/20/17 |
| Partin, Phillup Alan | Pasco | N | N | 9-3 | Y | 3/27/17 |
| Pasha, Khalid | Hillsborough | N | N | 11-1, 11-1 | Y | 5/11/17 |
| Peterka, Daniel Jon | Okaloosa | Y | N | 8-4 | N | 1/22/18 |
| Peterson, Robert Earl | Duval | N | N | 7-5 | Y | 7/6/17 |
| Pham, Tai | Seminole | N | N | 10-2 | Y | 3/22/17 |
| Phillips, Galante | Duval | N | N | 7-5 | Y | 4/20/17 |
| Phillips, Harry Franklin | Miami-Dade | Y | N | 7-5 | N | 1/22/18 |
| Philmore, Lenard James | Martin | N | Y | 12-0 | N | 1/25/18 |
| Pietri, Norberto | Palm Beach | Y | N | 8-4 | N | 2/2/18 |
| Poole, Mark | Polk | N | N | 11-1 | Y | 3/31/17 |
| Pope, Thomas Dewey | Broward | Y | N | 9-3 | N | 2/28/18 |
| Puiatti, Carl | Pasco | Y | N | 11-1 | N | 1/23/18 |
| Quince, Kenneth Darcell | Volusia | Y | WAIVED JURY | | N | 1/18/18 |
| Raleigh, Bobby Allen | Volusia | Y | Y | 12-0, 12-0 | N | 2/28/18 |
| Reaves, William | Indian River | Y | N | 10-2 | N | 5/2/18 |
| Reynolds, Michael | Seminole | N | Y | 12-0, 12-0 | N | 4/5/18 |
| Rhodes, Richard Wallace | Pinellas | Y | N | 10-2 | N | 1/23/18 |
| Rigterink, Thomas William | Polk | N | N | 7-5, 7-5 | Y | 4/6/17 |
| Rimmer, Robert | Broward | N | N | 9-3, 9-3 | Y | 6/29/17 |
| Robards, Richard | Pinellas | N | N | 7-5, 7-5 | Y | 4/6/17 |
| Rodgers, Jeremiah | Santa Rosa | N | WAIVED JURY | | N | 2/8/18 |
| Rodgers, Theodore | Orange | N | N | 8-4 | Y | 4/3/17 |
| Rogers, Glen Edward | Hillsborough | Y | Y | 12-0 | N | 1/30/18 |
| Rodriguez, Manuel Antonio | Miami-Dade | Y | Y | 12-0, 12-0, 12-0 | N | 1/31/18 |
| San Martin, Pablo | Miami-Dade | Y | N | 9-3 | N | 2/28/18 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Schoenwetter, Randy | Brevard | N | N | 10-2, 9-3 | Y | 4/7/17 |
| Seibert, Michael | Broward | N | N | 9-3 | Y | 6/22/17 |
| Serrano, Nelson | Polk | N | N | 9-3, 9-3, 9-3, 9-3 | Y | 5/11/17 |
| Sexton, John | Pasco | N | N | 10-2 | Y | 6/29/17 |
| Silvia, William | Seminole | N | N | 11-1 | Y | 2/20/17 |
| Simmons, Eric Lee | Lake | N | N | 8-4 | Y | 12/22/16 |
| Sireci, Henry Perry | Orange | Y | N | 11-1 | N | 1/31/18 |
| Sliney, Jack R. | Charlotte | Y | N | 7-5 | N | 1/31/18 |
| Smith, Corey | Miami-Dade | N | N | 9-3, 10-2 | Y | 3/16/17 |
| Smith, Joseph | Sarasota | N | N | 10-2 | Y | 7/13/17 |
| Smith, Stephen V. | Charlotte | N | Y | 9-3 | Y | 4/21/17 |
| Smithers, Samuel | Hillsborough | N | Y | 12-0, 12-0 | N | 3/29/18 |
| Snelgrove, David B. | Flagler | N | N | 8-4, 8-4 | Y | 5/11/17 |
| Sochor, Dennis | Broward | Y | N | 10-2 | N | 1/30/18 |
| Stein, Steven Edward | Duval | Y | N | 10-2 | N | 1/31/18 |
| Stephens, Jason Demetrius | Duval | Y | N | 9-3 | N | 1/22/18 |
| Stewart, Kenneth Allen | Hillsborough | Y | N | 10-2 | Y | 4/25/17 |
| Stewart, Kenneth Allen | Hillsborough | Y | N | 10-2 | N | 1/26/18 |
| Sweet, William Earl | Duval | Y | N | 10-2 | N | 1/24/18 |
| Suggs, Ernest | Walton | Y | N | 7-5 | N | 3/17/17 |
| Tanzi, Michael | Monroe | N | Y | 12-0 | N | 4/5/18 |
| Taylor, John Calvin | Clay | N | N | 10-2 | Y | 10/12/17 |
| Taylor, Perry | Hillsborough | Y | N | 8-4 | N | 5/3/18 |
| Taylor, Steven Richard | Duval | Y | N | 10-2 | N | 1/24/18 |
| Taylor, William Kenneth | Hillsborough | N | Y | 12-0 | N | 4/5/18 |
| Thomas, William Gregory | Duval | Y | N | 11-1 | N | 1/24/18 |
| Trease, Robert J. | Sarasota | Y | N | 11-1 | N | 1/24/18 |
| Trepal, George | Polk | Y | N | 9-3 | N | 1/26/18 |
| Trotter, Melvin | Manatee | Y | N | 11-1 | N | 1/26/18 |
| Troy, John | Sarasota | N | N | 11-1 | Y | 6/13/17 |
| Truehill, Quentin | St. Johns | N | Y | 12-0 | N | 2/23/17 |
| Tundidor, Randy W. | Broward | N | Y | 12-0 | N | 4/27/17 |
| Turner, James Daniel | St. Johns | N | N | 10-2 | Y | 6/19/17 |
| Twilegar, Mark | Lee | Y | WAIVED JURY | | N | 11/2/17 |
| Victorino, Troy | Volusia | N | N | 10-2, 10-2, 9-3, 7-5 | Y | 6/14/17 |
| Wade, Alan L. | Duval | N | N | 11-1, 11-1 | Y | 5/1/17 |
| Walls, Frank | Okaloosa | Y | Y | 12-0 | N | 1/22/18 |

| Prisoner Name | County of Conviction | Conviction Final Before Ring? | Jury Recommendation Unanimous? | Jury Vote(s) | Death Sentence Reversed? | Date of Court Order |
|---|---|---|---|---|---|---|
| Wheeler, Jason | Lake | N | N | 10-2 | Y | 5/23/17 |
| White, Dwayne | Seminole | N | N | 8-4 | Y | 3/30/17 |
| Whitfield, Ernest | Sarasota | Y | N | 7-5 | Y | 1/30/18 |
| White, William Melvin | Orange | N | N | 10-2 | Y | 4/20/17 |
| Whitton, Gary Richard | Walton | Y | Y | 12-0 | N | 1/31/18 |
| Willacy, Chadwick | Brevard | Y | N | 11-1 | N | 1/23/18 |
| Williams, Donald Otis | Lake | N | N | 9-3 | Y | 1/19/17 |
| Williams , Ronnie Keith | Broward | N | N | 10-2 | Y | 6/29/17 |
| Windom, Curtis | Orange | Y | Y | 12-0, 12-0, 12-0 | N | 1/23/18 |
| Wood, Zachary Taylor | Washington | N | Y | 12-0 | Y** | 1/31/17 |
| Woodel, Thomas | Polk | N | N | 7-5 | Y | 8/18/17 |
| Zack, Michael Duane | Escambia | Y | N | 11-1 | N | 6/15/17 |
| Zakrzewski, Edward | Okaloosa | Y | N | 7-5, 7-5, 6-6 | N | 5/25/17 |
| Zommer, Todd | Osceola | N | N | 10-2 | Y | 4/13/17 |

* The Florida Supreme Court granted relief under *Hurst* on Bevel's non-unanimous death sentence, but granted relief based on ineffective assistance of counsel on Bevel's unanimous death sentence.

** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. Not counted in total.

For more background on the Florida legislative and court actions related to the jury unanimity issue, see ***Hurst v. Florida* Background**.

To check on the status of cases involving Florida death-row prisoners with non-unanimous jury recommendations for death whose sentences became final after the U.S. Supreme Court's June 2002 decision in *Ring v. Arizona*, see **this chart**.

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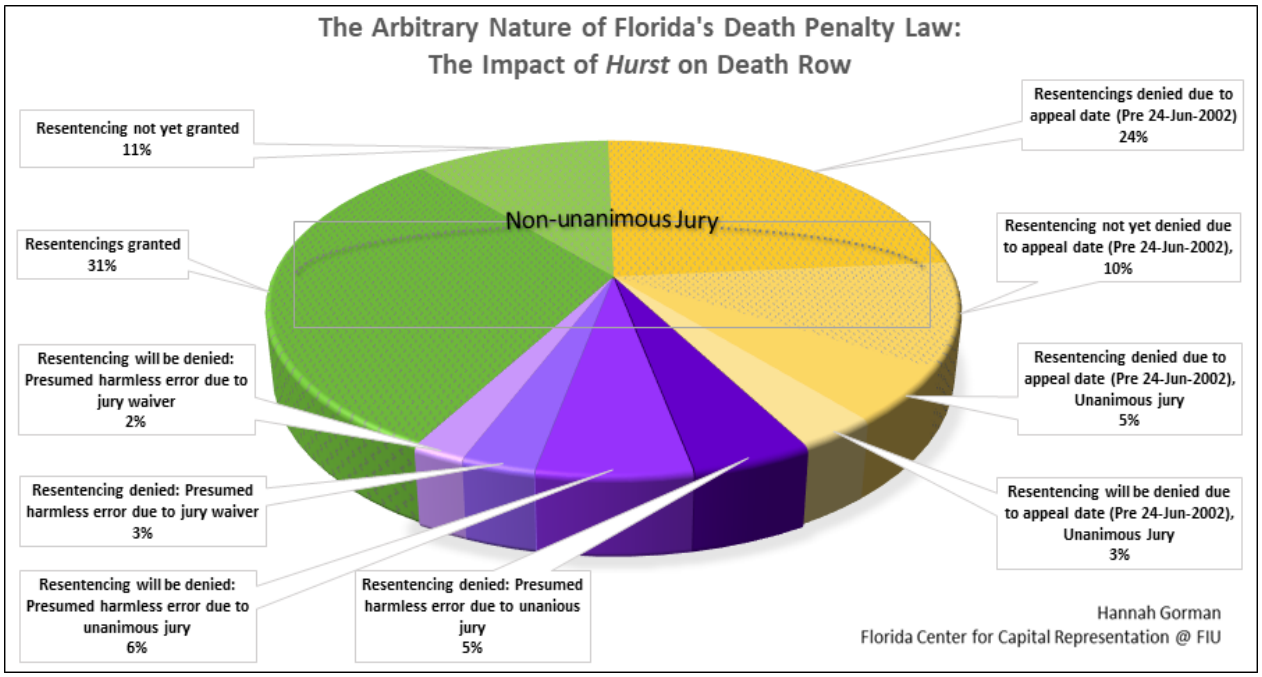
**Hannah Gorman, with the Florida Center for Capital Representation at Florida International University, created the pie chart below (November 16, 2017) based on her analysis of Florida death sentences that have been or will be overturned based on *Hurst*, as well as sentences that have been or will be affirmed because they either (A) became final before *Ring* (i.e., based on the date of their appeal) or (B) were presumed harmless based on a unanimous jury verdict or the defendant's waiver of a jury sentence. This chart includes prisoners who have had their death sentences affirmed by Circuit Courts. According to this information, there are a total of 377 prisoners who were sentenced under the unconstitutional sentencing scheme, but only 42% (157) of Florida death-row prisoners who were sentenced under that scheme will be entitled to relief.**


The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Non-unanimous Jury
Resentencings granted
31%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing will be denied: Presumed harmless error due to jury waiver
2%
Resentencing denied due to appeal date (Pre 24-Jun-2002), Unanimous jury
5%
Resentencing denied: Presumed harmless error due to jury waiver
3%
Resentencing will be denied due to appeal date (Pre 24-Jun-2002), Unanimous Jury
3%
Resentencing will be denied: Presumed harmless error due to unanimous jury
6%
Resentencing denied: Presumed harmless error due to unanious jury
5%
Hannah Gorman
Florida Center for Capital Representation @ FIU