CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE, Jr.,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Mr. Shere's case is no longer one of the most aggravated and least mitigated following *Hurst v. Florida* and *McCloud v. State*, because Mr. Shere's culpability is equal to or less than Mr. Shere's co-defendant whom received life after being convicted of a lesser degree of murder?

2. Whether Mr. Shere's death sentences violates equal protection based on his co-defendant's life sentence, made worse by the Florida Supreme Court's arbitrary and capricious retroactivity split based on *Ring v. Arizona.*

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PETITION FOR WRIT OF CERTIORARI

Richard Earl Shere, Jr. respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Pro. 3.851. The opinion of the Circuit Court in and for Hernando County denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on August 31, 2018, SC18-754. (Fla. Aug. 31, 2018), and is unreported in the Southern Reporter. The opinion is reproduced in Appendix B. The order denying rehearing is reproduced at Appendix C.

JURISDICTION

The Florida Supreme Court's final judgment was entered on August 31, 2018. Mr. Shere filed a timely motion for rehearing which was denied on October 26, 2018. This Court has jurisdiction to review this case under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

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

The Eighth Amendment to the United States Constitution states:

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

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

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

STATEMENT OF THE CASE

1. Case and Procedural History

Mr. Shere was charged by indictment on February 2, 1988 and pled not guilty. On April 21, 1989, the jury found Mr. Shere guilty as charged for one count of first degree premeditated murder. Co-defendant Demo was not tried with Mr. Shere.

A penalty phase was held on April 26, 1989. The advisory panel recommended death by a non-unanimous 7-5 vote. The trial court sentenced Mr. Shere to death despite the lack of a jury fact-finding and a unanimous verdict. The court found three statutory aggravating factors: heinous, atrocious and cruel (HAC), cold, calculated, and premeditated murder (CCP); and murder committed to

disrupt or hinder the lawful exercise of a governmental function or law enforcement.

The court found one statutory mitigating factor (age). During the penalty phase of the trial, the defense produced numerous witnesses who testified as to the general good character of Mr. Shere and how the actions of Mr. Shere would be out of character. Mr. Shere testified during the penalty phase. The testimony showed that Mr. Shere was 21 years of age at the time of offense and, that prior to this incident, he had engaged in drinking beer and smoking marijuana.

Mr. Shere further testified as to his religious beliefs and that prior to this case he had never been convicted of a felony. On direct appeal, *Shere v. State*, 579 So. 2d 86 (Fla. 1991), the Florida Supreme Court struck the HAC aggravator and ruled the error harmless.

On July 12, 1993, Mr. Shere filed a 3.850 motion and amended the motion March 3, 1997. On May 15, 1997, and June 4, 1997, a two-part evidentiary hearing was held. On September 26, 1996, and August 13, 1997, in a two-part ruling, the court denied relief on all claims.

On September 23, 1999, on postconviction appeal, the Florida Supreme Court affirmed, *Shere v. State*, 742 So. 2d 215 (Fla. 1999). On September 21, 2000, Mr. Shere filed a state habeas petition, which was denied on September 12, 2002. *Shere v. Moore*, 830 So. 2d

56 (Fla. 2002). On September 22, 2000, Mr. Shere filed a federal habeas petition, which was denied on July 11, 2007. On February 24, 2003, Mr. Shere filed a successive 3.851 motion pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied on October 17, 2003, and affirmed on appeal. *Shere v. State*, 903 So. 2d 936 (Fla. 2005).

Mr. Shere filed a federal habeas petition in the United States District Court which was denied. On September 12, 2007, Mr. Shere filed a motion for a certificate of appealability in the 11th Circuit, which granted one issue for appeal. Relief was denied on August 7, 2008. *Shere v. F.D.O.C.*, 537 F.3d 1304, 1305 (11th Cir. 2008). Mr. Shere filed numerous *pro se* state postconviction motions that are not relevant to this petition and are omitted for purposes of brevity.

On January 6, 2017, Mr. Shere filed a timely, successive rule 3.851 motion, challenging his death sentence based upon *Hurst*, *Ring*, and *Apprendi*. On August 22, 2017, the Fifth Judicial Circuit Court denied all of the motions. Mr. Shere filed an appeal. On October 13, 2017, the Florida Supreme Court issued an order to show cause for Mr. Shere to state "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445. [*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), reh'g denied, No. SC17-445, 2017 WL 4118830 (Fla. Sept. 18, 2017), and *cert. denied sub nom*. *Hitchcock v. Fla*.,

(2017)].” Following Mr. Shere’s response to the order to show cause and the State’s reply, the Florida Supreme Court ordered briefing on the non-*Hurst* related issues in this case. This was Florida Supreme Court case SC17-1703.

On November 16, 2017, Mr. Shere filed a successive motion for postconviction relief based upon *McCloud v. State*, 208 So. 3d 668 (Fla. 2016), which overturned *Shere v. Moore*, 830 So. 3d 56 (Fla. 2002), where the Florida Supreme Court refused to conduct a relative culpability review of Mr. Shere’s case even though his codefendant was convicted of a lesser degree of murder. This was Florida Supreme Court case SC18-754. This case forms the basis of this petition.

On August 31, 2018, the Florida Supreme Court affirmed the denial of both motions. Mr. Shere has filed a separate petition to this Court in case number 18-6877. This case is set for conference on February 15, 2019. In the opinion in the instant case the Florida Supreme Court stated:

> Shere's postconviction motion argued that he is entitled to a life sentence based on his relative culpability under *McCloud v. State,* 208 So. 3d 668, 687 (Fla. 2016). Shere contends that *McCloud* overruled *Shere v. Moore,* 830 So. 2d 56, 62 (Fla. 2002), which provides that this Court does not conduct a relative culpability analysis when the codefendant is convicted of a lesser crime. Contrary to Shere's claim, *McCloud* did not overturn the general rule. *McCloud* carved out an exception for the specific situation in which a jury both convicts the defendant of a more serious crime than his or her codefendant and also explicitly enters a special interrogatory

> verdict finding that the defendant was not the shooter. *McCloud ,* 208 So. 3d at 688. *See also Hannon v. State,* 228 So. 3d 505, 510 (Fla. 2017) (finding *McCloud* "inapposite" in the absence of an interrogatory verdict); *Jeffries v. State,* 222 So. 3d 538, 547-58 (Fla. 2017) (declining to conduct a relative culpability analysis where codefendants agreed to plea deals).
>
> No jury finding exists in Shere's case that would meet the *McCloud* exception. Therefore, we affirm the trial court's denial of postconviction relief.

Shere v. State, No. SC18-754, 2018 WL 4293400, at *1 (Fla. Aug. 31, 2018), *reh'g denied*, No. SC18-754, 2018 WL 6729930 (Fla. Oct. 26, 2018). The Florida Supreme Court denied rehearing. That was the extent of the Florida Supreme Court's opinion. Since the Florida Supreme Court did not allow briefing following the denial of relief in this case Mr. Shere attaches the original motion to show the scope of his issues. *See* Appendix D.

2. The Relevant Florida Supreme Court Decisions in Mr. Shere's Case (*Shere v. State*, *Shere v. Moore*, and *McCloud v. State*)

Mr. Shere was convicted and sentenced to death by the trial court after an advisory jury panel returned a 7-5 recommendation for death. Mr. Shere appealed to the Florida Supreme Court. *Shere v. State*, 579 So. 2d 86 (Fla. 1991). The Florida Supreme Court found that the trial court's denial of a mistrial after the State elicited that law enforcement located Mr. Shere "at the courthouse" despite the trial court's pretrial order barring the State from presenting such evidence, was not an "abuse of discretion," even

if the State's conduct "may have been questionable." *Id*. at 90.

Next, the Florida Supreme Court found that the trial court's allowing the State to call a witness Heidi Greulich as a "court witness" without the State "first establishing that that a sufficient basis exists to believe that the moving party cannot vouch for the witness's credibility." *Id*. 92-93. The court found that:

> Over Shere's objection, the trial court allowed Greulich to testify as a court witness, relying on arguments of counsel without reviewing any of the prior statements, proffering Greulich's testimony, or examining any other evidence. Subsequently, a substantial portion of the state's cross-examination of Greulich focused on her prior statements in which she described what Shere did and said before and after the murder. Time and again, when she said she could not recall what happened, the state attempted to impeach her by reading to the jury her prior, unsworn, out-of-court statements that inculpated Shere. It was improper to "impeach" Greulich with her prior statements after she merely said she did not remember what happened, especially when those statements had not been shown to be materially inconsistent.

Id. at 93. (Citation omitted). The court found that the trial court "also erred by calling Greulich as a court witness on the ground that she was hostile," because declaring a witness hostile merely allows leading questions, not impeachment. *Id*. at 94. This too was found "harmless" by the Florida Supreme Court. The court then affirmed the trial court's denial of a jury interview and a new trial based on an anonymous letter received by the St. Petersburg Times. The court described the contents of the letter, "purportedly

written by a member Shere's jury," as alleging,

> that the writer did not know Shere could have been found guilty of the lesser offense of second-degree murder; that the jury "chair person" shared the writer's lack of understanding; that the death sentence was inappropriate in light of Demo's participation and conviction of second-degree murder in a separate trial for the same offense; that two jurors failed to disclose to "Judge O'Neil" in voir dire that they knew Shere; and that a juror failed to disclose in voir dire that her brother had been murdered a few years ago, following which the murderer was convicted, sentenced, and "out on the street" seven years later.

Id. at 94. "Having found no reversible error in the guilt phase of the trial, [the court] conclude[d] that there is substantial competent evidence in the record to support Shere's conviction of first-degree murder." *Id*. at 95. Apparently, none of these "harmless errors" occurred in Mr. Demo's trial that resulted in only a second degree murder conviction.

The Florida Supreme Court found that the Florida death penalty statute was not unconstitutional despite Mr. Shere's claim that "the statutory aggravating and mitigating circumstances, as applied, do not adequately limit the class of persons eligible for the death penalty and thus render the death penalty susceptible to undue arbitrary and capricious application." *Id*. at 95. Having rejected this claim previously, the court found that it "merit[ed] no further discussion." *Id*.

Mr. Shere challenged the trial court's penalty-phase instructions and findings. *Id*. The Florida Supreme Court upheld

two aggravating factors but rejected the heinous, atrocious and cruel aggravating factor because there was "insufficient evidence in this record to conclude that [it] was proved beyond a reasonable doubt." *Id*. The court did not remand for a new penalty phase and instead concluded that "the trial court would have imposed the same sentence" without the HAC aggravating factor thus finding the error was "harmless." *Id*. at 96.

Mr. Shere pursued postconviction relief arguing that trial counsel were ineffective at the guilt and penalty phase. Mr. Shere alleged that counsel was ineffective for failing to investigate or further develop Mr. Shere's mental mitigation. Apart from the issue of counsel's ineffectiveness, it is important to note that there does not appear to have been any neuropsychological testing to determine whether there was brain damage resulting from Mr. Shere's childhood head injury or otherwise. The Florida Supreme Court described the evidentiary testimony of Dr. James Larson, that, "based on the evidence before him then, it would have been prudent to have ordered neuropsychological testing for Shere." *Shere v. State*, 742 So. 2d 215, 223 (Fla. 1999). The court affirmed the postconviction court, finding that, "even though the new expert, Dr. Larson, testified at the hearing that it was possible that statutory mitigating circumstances existed, the trial court found that he could not specifically address any mitigating circumstances or establish a basis for his opinion. Thus, [the

court] conclude[d] that the trial court's legal conclusions are supported by [its] prior opinions." *Id*. at 224.

In *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002), Mr. Shere finally raised the issues concerning his sentencing being excessive compared to Mr. Demo's sentence in a habeas corpus petition. Because this issue could have been raised on direct appeal, Mr. Shere was forced to raise the disparate sentence as a claim of ineffective assistance of appellate counsel. While the Florida Supreme Court admitted that it did not discuss the proportionality of Shere's sentence in its opinion, *id*. at 57, the court held, despite the dissent of Chief Justice Anstead and Justice Pariente,

> Therefore, once a codefendant's culpability has been determined by a jury verdict or a judge's finding of guilt we should abide by that decision, and only when the codefendant has been found guilty of the same degree of murder should the relative culpability aspect of proportionality come into play. Moreover, the codefendant should not only be convicted of the same crime but should also be otherwise eligible to receive a death sentence, i.e., be of the requisite age and not mentally retarded.

Id. at 62.

On November 17, 2016, the Florida Supreme Court decided *McCloud v. State*, 208 So. 3d 668 (Fla. 2016); *reh'g denied*, No. SC12-2103, 2017 WL 374757 (Fla. Jan. 26, 2017). The court expressly overturned *Shere v. Moore*, the exact case which the court denied Mr. Shere relief in 2002. The court rejected the limitation "that

the relative culpability of a codefendant is implicated 'only when the codefendant has been found guilty of the same degree of murder.'" *Id*.; citing *Shere v. Moore*, 830 So.3d 56, 62 (Fla. 2002). The court rejected the limitation because it did not "see the utility in a blanket rule prohibiting a relative culpability analysis when a codefendant is convicted or pleads guilty to a different degree of murder than the primary defendant." *Id*. at 687. Instead, the court quoted Justice Anstead's opinion concurring in part, and dissenting, in part, because "such a rule would do a substantial injustice in cases like the one at bar." *Id*. The court further quoted Chief Justice Anstead:

> Due to the uniqueness and the finality of death, this Court addresses the propriety of all death sentences in a proportionality review upon appeal. *See Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). In conducting this review, this Court considers the totality of all the circumstances in a case as compared to other cases in which the death penalty has been imposed, see *Robinson v. State*, 761 So.2d 269 (Fla.1999), thereby providing for uniformity in the application of this sentence. As a corollary to this analysis of comparing the circumstances of a case in which death had been imposed to others with a similar sentence, the Court also performs an additional analysis of relative culpability in cases where more than one defendant was involved in the commission of the killing.
>
> While the first analysis focuses on the larger universe of death sentences that have been imposed, the latter analysis [hones] in on the smaller universe of the perpetrators and participants in a given capital murder. We explained the principle in *Slater v. State*, 316 So.2d 539, 542 (Fla.1975), when we declared: "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts." More

> recently, in *Ray v. State*, 755 So.2d 604, 611 (Fla.2000), this Court again emphasized and reaffirmed the principle that equally culpable codefendants should be treated alike in capital sentencing.

Id. at 687–88 (citing *Shere*, 830 So. 2d at 64 (Anstead, J., concurring in part and dissenting in part)). Chief Justice Anstead also explained in *Shere v. Moore*,

> Perhaps the most telling observation of all in the record on this issue is that of the trial judge, who concluded: "*The exact nature of Shere's participation in the murder will never be known,* but it is clear that Drew Snyder was shot ten times with .22 caliber firearms-six times with a rifle belonging to Richard Shere and four times with a pistol belonging to Bruce Demo." (Emphasis supplied.) Hence, at most, the record reflects a classic case of two **equally** culpable codefendants. One of them received a life sentence, the other received a death sentence.

Id. at 70. (Footnotes omitted).

In Mr. McCloud's case, unlike Mr. Shere's, the jury returned a special interrogatory that Mr. McCloud was not the shooter. In Mr. Shere's case, there was a conflict in who was the shooter. According to Mr. Shere's statement to law enforcement,

> Bruce "Brewster" Demo told [Mr. Shere] on December 24 that Snyder was going to inform the police about Demo's and Snyder's theft of some air conditioners. Demo also advised Shere that Snyder was a "big mouth" who "had ratted out" on Shere as well. Shortly after midnight on the morning of December 25, Shere received a telephone call from Demo advising him that Demo was thinking about killing Snyder, and Demo threatened to kill Shere if he did not help. Shere then went to Demo's house where Demo loaded a shovel into Shere's car. They smoked marijuana, drank beer, went to Snyder's house at about 2:30–3:00 a.m., and talked Snyder into going rabbit hunting.
>
> At some point during the hunt in the early morning hours,

> Shere placed his .22–caliber pump action rifle on the roof of the car so he could relieve himself. Suddenly, Shere said, Demo grabbed the rifle, and Shere heard the weapon discharge. Shere dropped to the ground and heard Snyder say, “Oh, my God, Brewster,” followed by several more shots. When the shooting stopped, Shere got up and saw Snyder, still breathing, lying on the back seat of the car. Shere said he wanted to take Snyder to the hospital, but Demo took out his own gun, a .22–caliber pistol, and shot Snyder in the forehead, pulled him out of the car, and shot Snyder again in the chest. After the last shot was fired, they loaded Snyder's body into the trunk and drove to a nearby location where Shere said Demo made him dig a hole and bury the body. Then Shere took Demo home, drove to his own house, cleaned up, and burned the bloodied back seat of his car in the back yard.

Shere, 579 So. 2d at 88. Heidi Gruelich testified in error as a court witness (*see id*. at 93-94). The evidence contradicting Mr. Shere’s account was described by the Florida Supreme Court as follows:

> Contradicting Shere's account, Demo made a statement to detectives in which he accused Shere of firing the first shots. Detective Alan Arick testified in the defendant's case without objection that Demo said he turned his back to the car to relieve himself when he heard a shot. He turned and saw Shere pointing the rifle at Snyder, then Shere fired at Snyder five or six times through the car's window. Demo said Shere pointed the gun at him and told him to finish off Snyder, Arick testified. Demo said he fired the pistol two times into Snyder's head and one time to the heart, including “the fatal shot.” Demo told Arick he made Shere dig the grave because he was upset by what Shere had done to Snyder.
>
> Greulich testified as a court witness about a statement she made to detectives in January 1988. In her statement she told detectives that she overheard Shere's end of the telephone conversation with Demo in the early hours of December 25. Shere reportedly said to Demo “I can't believe Drew would turn state's evidence against me.” When Shere returned home on the morning of December 25,

> Greulich told detectives, she saw blood on Shere's jeans and on the back seat of Shere's car. Greulich testified that Shere told her he alone killed Snyder, but he said that only to protect her, because "[i]f I knew Brewster was out there, Brewster would have hurt me."
>
> Shere's friend, Ray Pruden, testified that one night after Christmas Shere told him he shot Snyder to death while out rabbit hunting. He said he shot him ten or fifteen times, then buried the body. Shere did not say that Demo was involved, Pruden testified.

Id. at 88–89.

A glaring distinction between the cases is that Mr. Shere's trial attorney "opened the door for the State to draw from the detective the portions of Demo's statements that conflicted with the Shere's account, statements that the jury otherwise would never have heard." *Shere*, 742 So. 2d at 219. The Florida Supreme Court upheld the postconviction court's finding of strategy based on the testimony of trial counsel that the decision to call Detective Arick was "not a mistake." It may have turned out to be a mistake, but at the time of trial, [Mr. Shere's defense counsel] thought it was right." *Id*. at 221. While protected by the strategy exception to ineffective assistance of counsel, the introduction of Mr. Demo's self-serving, uncross-examined statements was not a sufficient basis for the excessive sentence in Mr. Shere's case.

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

The Florida Supreme Court relied on the finding that, "[n]o jury finding exists in Shere's case that would meet the *McCloud*

exception." Shere at *1. The court failed to acknowledge that Mr. Shere was tried under Florida's pre-*Hurst* unconstitutional death penalty scheme and therefore was denied a jury trial during penalty phase or special interrogatories.

This was in line with the Florida Supreme Court only allowing for limited retroactive application of this Court's decision in *Hurst v. Florida*, and its own decision in *Hurst v. State,* despite finding that under Florida's death penalty scheme unanimous jury verdicts are required to meet the demands of the Florida Constitution and the Eighth Amendment. The Florida Supreme Court drew a line based on the date each individual case became final in relation to the date this Court issued *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court has been unwilling to consider the constitutional implications beyond those that were discussed in the *Hurst* cases like Mr. Shere raised in his last *Hurst* related motion.

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

> "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's

> judge not engaged in any factfinding, Ring would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

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

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So. 2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy *Hurst* could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased *Hurst*'s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 621-22.

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

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

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

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital

> sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

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

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

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in

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

Id. at 633.

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

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

REASONS FOR GRANTING THE WRIT

MR. SHERE'S DEATH SENTENCE NO LONGER FITS IN THE NARROW CLASS OF CASES THAT ARE THE MOST AGGRAVATED AND LEAST MITIGATED.

Mr. Shere's death sentence by a vote of 7-5 was obtained without consideration of his co-defendant's life sentence and with improper consideration of an illicit aggravating factor. While his death sentence never met the requirements of the Eighth and Fourteenth Amendments, the progress in the law over time shows even more clearly that his death sentence is unconstitutional.

Mr. Shere acknowledges that this Court has found that proportionality analysis, *per se*, is not required as a matter of constitutional law. *See Pulley v. Harris*, 465 U.S. 37, 43–44 (1984) (holding that, "[T]he Eighth Amendment, applicable to the States through the Fourteenth Amendment, [does not]require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner."). However, the denial of relief below has rendered Florida's sentencing scheme "so lacking in other checks and on arbitrariness that it would not pass constitutional muster without comparative proportionality review," *id*. at 51, when the arbitrariness in the Florida Supreme Court's denial of *Hurst* relief to all of the pre-*Ring*, its granting of relief to all post-*Ring* non-unanimous cases, and Mr. Shere's co-defendant's sentence are considered.

The Florida Supreme Court has used proportionality review to meet the constitutional requirements for narrowing the class of individuals subject to the death penalty as made explicit here:

> Several of the reasons that led this Court to uphold Florida's amended capital punishment statute in *Dixon* were critical to the United States Supreme Court's subsequent decision to uphold the constitutionality of capital punishment in the aftermath of *Furman.* In *Gregg,* 428 U.S. at 189, 96 S.Ct. 2909 a plurality of the Supreme Court explained that *Furman* "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."
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> Key to what this Court has described as the "reasonable and controlled, rather than capricious and discriminatory" discretion necessary to uphold Florida's capital sentencing scheme as constitutional is "[r]eview of a sentence of death by this Court, provided by Fla. Stat. § 921.141." *Dixon,* 283 So.2d at 7, 8. Indeed, in *Gregg,* the Supreme Court plurality declared a similar provision in Georgia's death penalty statute—providing for automatic appeal of all death sentences and a statutory requirement that each sentence of death be reviewed to determine "whether the sentence is disproportionate compared to those sentences imposed in similar cases"—to be "an important additional safeguard against arbitrariness and caprice" in the imposition of the death penalty. *Gregg,* 428 U.S. at 198, 96 S.Ct. 2909. As the Supreme Court stated:
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> > In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman,* the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure *548 that the sentence of death in a particular case is not disproportionate. On their face these procedures

> seem to satisfy the concerns of *Furman.* No longer should there be "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." 408 U.S., at 313 [92 S.Ct. 2726] (White, J., concurring).
> *Id.*

Moreover, in *Proffitt v. Florida,* 428 U.S. 242, 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion), a plurality of the Supreme Court, in specifically upholding the constitutionality of Florida's amended capital punishment statute after *Furman,* cited to this Court's discussion in *Dixon* of proportionality review as part of the "procedures, like those used in Georgia [and discussed in *Gregg*], [that] appear to meet the constitutional deficiencies identified in *Furman.*" The Supreme Court explained that the "Florida capital-sentencing procedures ... seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner" and that "to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system." *Id.* at 252–53, 96 S.Ct. 2960. The Supreme Court plurality explained this review, an essential linchpin to upholding the facial constitutionality of Florida's amended death penalty statute, as follows:

> Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. *Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.* Thus, in Florida, as in Georgia, it is no longer true that there is " 'no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.' " *Gregg v. Georgia,* 428 U.S., at 188 [96 S.Ct. 2909], quoting *Furman v. Georgia,* 408 U.S., at 313 [92 S.Ct. 2726] (White, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman.*
> *Id.* at 253, 96 S.Ct. 2960 (emphasis added).

Yacob v. State, 136 So. 3d 539, 547–48 (Fla. 2014). The Florida Supreme Court certainly understands that its proportionality review is essential to meeting the Eighth Amendment's requirement, in Mr. Shere's case and in every death penalty case in Florida.

Equal Protection and Arbitrariness and Capriciousness.

The Florida Supreme Court's decision in Mr. Shere's case violated the Eight Amendment and Equal Protection. The Eighth Amendment requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id*. at 428. This command "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). It refines the older, settled precept that the Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Florida Supreme Court's *Ring-split* dividing line violates these holdings of this Court. Mr. Shere's death sentence is excessive compared to other murders generally and his codefendant in particular. The Florida

Supreme Court has thus laid an unequal hand on Mr. Shere.

Moreover, as stated in *McCleskey v. Kemp*, 481 U.S. 279 (1987), there is "a second principle inherent in the Eighth Amendment, 'that punishment for crime should be graduated and proportioned to offense.'" *McCleskey,* 481 U.S. at 300 (citing *Weems v. United States*, 217 U.S. 349, 378 (1910)). When compared to the more aggravated, and less mitigated, cases that will receive new sentencings that result in life, simply because of the date their case became final, Mr. Shere's death sentence is no longer "graduated and proportioned to [the] offense." *Id*. Most importantly, it is not graduated or proportionate to Mr. Demo's sentence as well.

In *McCloud*, the Florida Supreme Court rejected "any principle of law that hamstrings [the] Court's ability to conduct full proportionality review . . .." *McCloud*, 208 So. 3d at 688. Mr. Shere has never had *any* review of his sentence in comparison to his co-defendant's, either formally or inherently by the sentencing court and advisory panel. *See Shere*, 830 So. 2d at 63, ANSTEAD, C.J., concurring in part and dissenting in part, (finding that "Shere was individually tried before a jury in April of 1989, while his codefendant, Demo, was tried separately, and sentenced to life imprisonment, after Shere had been tried and convicted, but before Shere was sentenced. Shere asserts that although the trial court was aware of Demo's life sentence, the trial court

erroneously failed to consider it as a mitigating circumstance, and Shere's jury was never informed of the codefendant's life sentence. Even without knowledge of his codefendant's sentence, Shere's jury recommended a death sentence by a vote of seven to five, only one vote short of a life recommendation.").

While Mr. Shere had no right to proportionality review, he had a right to a sentence that did not transgress the Eighth Amendment. Mr. Shere's death sentence violates the Eighth Amendment's ban on arbitrary and capricious punishment and cruel and unusual punishment in light of Mr. Demo's sentence. Mr. Shere remains sentenced to death when he is at the most equally culpable and likely less culpable than his older codefendant. Accordingly, Mr. Shere does not have one of the most aggravated and least mitigated cases if Mr. Demo does not equally have such a case. Because it has not been established that Mr. Shere was more culpable than Mr. Demo, Mr. Shere would have received a life sentence under a constitutional system.

Mr. Shere's death sentence is arbitrary and capricious because it has been maintained without proportionality being considered in a general manner, and without consideration of proportionality of Mr. Shere's sentence to Mr. Demo's sentence. While proportionality is a state law requirement, in Florida it is essential to complying with the Eighth Amendment's requirement that only the most aggravated and least mitigated cases result in

a death sentence. In comparison to Mr. Demo's case, Mr. Shere's case is not. Furthermore, Mr. Shere's death sentence violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985) because the jury's role was diminished by the standard jury instructions which were thought to be constitutional at the time.

For Mr. Shere to remain under a death sentence without the court considering whether his case is still the most aggravated and least mitigated denies Mr. Shere Due Process under the Fourteenth Amendment, Equal Protection under the Fourteenth Amendment, and amounts to a violation of the Eighth Amendment. To allow Mr. Shere's death sentence to stand without considering the proportionality of his case to Mr. Demo's, in light of *McCloud*, while doing so in *McCloud* and subsequent cases in which a codefendant is sentenced to less than first degree murder violates Mr. Shere's right to Equal Protection under the Fourteenth Amendment of the United States Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

That the relevant sentencers failed to consider the fact that Mr. Demo received a life sentence is a further violation of the Eighth Amendment because it precluded the consideration of mitigation. In the case of the advisory panel, they simply did not know. The courts refused to consider this when it was known by the time of formal sentencing by the trial court, but not raised on

direct appeal by appellate counsel. The Florida Supreme Court became fully aware of it in *Shere v. Moore*, later overruled by *McCloud*. A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978) explained:

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605 (emphasis and footnotes omitted). No sentencer or court has considered that Mr. Demo was sentenced to life. *McCloud* requires proper proportionality that is not "hamstring[ed]." *McCloud* at 688.

Mr. Shere was sentenced to a death sentence that far exceeds his culpability and the limits placed on the states' ability to impose death. This Court should grant certiorari.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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