No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE ROBINSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

CHELSEA RAE SHIRLEY*
FLORIDA BAR NUMBER 112901

JULISSA R. FONTÁN*
FLORIDA BAR NUMBER 0032744

KARA R. OTTERVANGER
FLORIDA BAR NUMBER 112110
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR THE PETITIONER

****COUNSEL OF RECORD***

No. 18A851

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE ROBINSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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INDEX TO APPENDICES

Orders and Opinions

Appendix
A

Supreme Court of Florida

No. SC18-16

MICHAEL LEE ROBINSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

December 20, 2018

PER CURIAM.

Appellant Michael Lee Robinson, a prisoner under sentence of death, appeals an order of the Circuit Court for the Ninth Judicial Circuit denying his successive motion for postconviction relief. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. As explained below, we affirm.

Facts and Procedural History

In 1995, Robinson confessed to the killing of Jane Silvia, and pleaded guilty to first-degree murder. *Robinson v. State* (*Robinson I*), 684 So. 2d 175, 176 (Fla. 1996). Robinson forbade his attorneys from mounting any defense whatsoever, waived his right to a penalty-phase jury, and told the trial court he wished to be

sentenced to death. *Id.* During the penalty phase, the State called Detective David Griffin as its sole witness, and a recording of Robinson's confession to Detective Griffin was published to the court. *Id.* Relying on *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), Robinson's attorneys made a proffer of the evidence they would have presented in mitigation had Robinson allowed it. *Robinson I*, 684 So. 2d at 176.

The trial court found three aggravating factors: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Id.* Because explicit mitigation evidence was only proffered and not in fact presented, the trial court did not consider any possible mitigating circumstances. *Id.* at 176-78. The trial court determined the aggravating factors established by the State outweighed any potential mitigating circumstances, and sentenced Robinson to death. *Id.* On appeal, this Court held the trial court's failure to consider mitigating circumstances contained in the record as a whole, rather than solely those proffered by Robinson's counsel, was inconsistent with this Court's decision in *Farr v. State*, 621 So. 2d 1368 (Fla. 1993). *Robinson I*, 684 So. 2d at 177. This Court affirmed the conviction but vacated Robinson's death sentence and remanded to the trial court "to conduct a new penalty phase

hearing *before the judge alone*" with instructions to "consider and weigh all the available mitigating evidence in the record as required by *Farr*." *Id.* at 180 (emphasis added).

At the beginning of the second penalty phase, Robinson's counsel made an *ore tenus* motion to withdraw Robinson's guilty plea, which the trial court denied. *Robinson v. State* (*Robinson II*), 761 So. 2d 269, 273 (Fla. 1999). The State presented the same testimony during the second penalty phase as it had in the first, and the defense presented extensive testimony regarding Robinson's mental health, chronic drug use, and difficult childhood. *Id.* at 271-72.[1] At no point did Robinson attempt to withdraw his prior waiver of a penalty-phase jury; indeed, the record reflects that he told the trial court he was "really comfortable with the fact that the state supreme court remanded [the case] back without a jury again the second time." The trial court found the same three aggravating factors as it had during the first penalty phase. *Id.* at 272-73. The trial court also found two

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1. Robinson argued that, because the penalty phase hearing was a new hearing which would include all aspects of the penalty phase, the State should have been required to re-prove any and all aggravating circumstances. The trial court ruled that the aggravating circumstances had been established during the first penalty phase and upheld by this Court on appeal, and therefore the State was not required to prove them a second time. *See Robinson I*, 684 So. 2d at 180 n.6 (holding Robinson's argument that the aggravating circumstances were not proven beyond a reasonable doubt was "without merit").

statutory mitigating factors and eighteen nonstatutory mitigating factors, and again sentenced Robinson to death. *Id.* at 273.

On direct appeal, Robinson asserted (1) the trial court erred by denying his motion to withdraw his plea; (2) the trial court erred by denying his motion for neurological testing; (3) the trial judge made prejudicial comments on the record and denied Robinson's request for funds to investigate additional mitigation evidence; (4) Robinson's death sentence was disproportionate; and (5) the trial court erred in finding each of the three aggravating factors. *Id.* at 273 n.4. Robinson did not raise any claims relating to his waiver of a penalty-phase jury. This Court denied relief and affirmed Robinson's sentence. *Id.* at 279. On April 3, 2000, the United States Supreme Court denied Robinson's petition for writ of certiorari, and Robinson's conviction and sentence became final. *Robinson v. Florida*, 529 U.S. 1057 (2000).

On October 3, 2001, Robinson filed a motion for postconviction relief, raising seventeen claims. *Robinson v. State* (*Robinson III*), 913 So. 2d 514, 518 (Fla. 2005). Of these claims, only one is relevant to the present matter: Robinson argued his trial counsel was ineffective for failing to properly inform him of his right to a jury trial and for failing to assert Robinson's desire to have a jury determine his sentence. *Id.* at 523. The postconviction court denied the motion, and this Court affirmed that denial. *Id.* at 517. This Court explained that, during

the second penalty phase, Robinson's trial counsel was "following this Court's express mandate" that resentencing would proceed without a jury. *Id.* at 523; *see Robinson I*, 684 So. 2d at 180 (remanding for a second penalty phase "before the judge alone"). This Court also held this claim was procedurally barred because it could have been raised either in a motion for rehearing in *Robinson I* or on direct appeal from the second penalty-phase hearing in which the circuit court re-imposed a sentence of death, but it was not. *Robinson III*, 913 So. 2d at 523 n.8.

Robinson III also addressed a petition for writ of habeas corpus Robinson filed in this Court while his motion for postconviction relief was pending. The petition raised three claims: (1) this Court erred in *Robinson I* by remanding for a new penalty phase before the judge alone; (2) Robinson's appellate counsel in *Robinson II* rendered ineffective assistance by failing to raise that issue on appeal; and (3) Robinson's death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). *Robinson III*, 913 So. 2d at 528. We rejected Robinson's first claim on the merits, and further held the claim was procedurally barred because it had been raised in his motion for postconviction relief. *Id.* We also denied Robinson's second claim on the merits, explaining that "appellate counsel had no reason to challenge" our earlier decision "that the new penalty phase was to be before the judge alone," and the issue would therefore have been meritless. *Id.*

Finally, we denied Robinson's *Ring* claim on the ground that we had "previously determined that Robinson lawfully waived the right to a penalty phase jury." *Id.*

The Present Case

On September 18, 2017, Robinson filed a successive motion to vacate his sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. Robinson's successive motion raised three claims. First, Robinson claimed his death sentence violates the Sixth Amendment to the United States Constitution pursuant to *Hurst v. Florida* (*Hurst v. Florida*), 136 S. Ct. 616 (2016), and *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016). Second, Robinson claimed his death sentence violates the Eighth Amendment to the United States Constitution pursuant to *Hurst*. Finally, Robinson argued his prior claims of ineffective assistance of counsel must be reconsidered in light of *Hurst v. Florida* and *Hurst* because those decisions created new law which would affect the disposition of his prior claims.

On November 8, 2017, the postconviction court summarily denied the motion. Robinson appealed, and on February 23, 2018, this Court ordered the parties to show cause why the postconviction court's denial of relief should not be affirmed pursuant to *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In *Mullens*, we held a defendant who waived his right to a penalty-phase jury and was sentenced to death after *Ring* was decided was not entitled to relief pursuant to *Hurst v. Florida*. 197 So. 3d at 38-40.

Analysis

1. Robinson is not entitled to retroactive application of Hurst v. Florida *and* Hurst.

We affirm the postconviction court's denial of relief because Robinson is not entitled to retroactive application of *Hurst v. Florida* and *Hurst*. Prisoners whose sentences of death were final before the United States Supreme Court issued its decision in *Ring* are not entitled to retroactive application of *Hurst v. Florida* and *Hurst*. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). We have repeatedly reaffirmed this holding, *see Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (citing examples and denying relief), and the circumstances of this case do not compel departure from our precedent. Robinson's conviction and sentence became final on April 3, 2000, more than two years before *Ring* was issued. *See Robinson v. Florida*, 529 U.S. 1057 (2000). Therefore, *Hurst v. Florida* and *Hurst* do not apply retroactively to Robinson's sentence.

In a one-sentence footnote in his initial brief in this Court, Robinson argues that considerations of fundamental fairness require us to apply *Hurst* retroactively to his sentence, pursuant to *James v. State*, 615 So. 2d 668 (Fla. 1993). Such cursory treatment is insufficient to raise a claim for review. *See Knight v. State*, 225 So. 3d 661, 675 (Fla. 2017) (holding a claim argued only in two sentences was not sufficiently pleaded). We have also previously declined to adopt a similar "fundamental fairness" retroactivity standard based on preservation of a *Ring*-like

claim prior to the United States Supreme Court's issuance of its decision in *Ring*. *See Asay*, 210 So. 3d at 30-31 (Lewis, J., concurring in result) (concluding that *Hurst* should apply retroactively to pre-*Ring* cases in which the defendant raised a *Ring*-like claim before *Ring* was decided). Furthermore, like Asay, Robinson did not raise a *Ring*-like claim at trial: rather, Robinson raised a *Ring* claim for the first time in his petition for writ of habeas corpus, which was filed after he was resentenced to death and which this Court adjudicated in conjunction with his initial postconviction proceeding. *See Robinson III*, 913 So. 2d at 528; *see also Asay*, 210 So. 3d at 11 n.12 (noting that Asay did not preserve a *Ring*-like claim). We therefore decline to apply *Hurst* retroactively to Robinson's sentence on the basis of "fundamental fairness."

2. Mullens *is not distinguishable.*

Even if *Hurst* were to apply to Robinson's sentence, the present claim regarding his right to a penalty-phase jury is procedurally barred because it "could and should have been raised on direct appeal." *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *see also Lugo v. State*, 2 So. 3d 1, 21 (Fla. 2008) (holding a challenge to a prisoner's extradition from the Bahamas was procedurally barred because of failure to challenge the extradition either at the trial level or on direct appeal). Had Robinson's claim been properly preserved—which it was not—by a motion to empanel a jury during the second penalty phase, Robinson could have

challenged the validity of his penalty-phase waiver on direct appeal. Indeed, we determined this precise issue to be barred for this precise reason in *Robinson III*, explaining: "[T]his claim is procedurally barred because it is a matter proper for a motion for rehearing and could have been raised in Robinson's direct appeal from resentencing." 913 So. 2d at 523 n.8. We also rejected this claim on the merits in denying Robinson's petition for writ of habeas corpus. *Id.* at 528.

Because Robinson is barred from challenging the validity of his waiver of a penalty-phase jury, and because we have previously rejected that claim on its merits, Robinson cannot show cause why *Mullens* does not control this case. The defendant in *Mullens* pleaded guilty to two counts of first-degree murder and one count of attempted first-degree murder, and waived his right to a jury recommendation in the penalty phase. 197 So. 3d at 20. The United States Supreme Court issued *Hurst v. Florida* while Mullens's direct appeal was pending in this Court. *Id.* at 38. Mullens claimed his death sentence violated *Hurst v. Florida* because he had been sentenced to death without a unanimous finding by a jury that such a sentence should be imposed. *See id.* at 38-40 (discussing Mullens's *Hurst v. Florida* claim). Therefore, Mullens argued, his sentence should be commuted to life imprisonment.

We rejected Mullens's claim on the ground that *Hurst v. Florida* did not prohibit waiver of the Sixth Amendment right to jury factfinding, and reasoned

that, "[a]s with a guilty plea . . . a waiver of the right to jury sentencing will be upheld if that waiver is knowingly, voluntarily, and intelligently made." *Id.* at 39. We described the trial court's "persistent question[ing]" of Mullens, and determined "that Mullens's waiver was knowing, voluntary, and intelligent." *Id.* Therefore, we concluded, Mullens could not "subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law ha[d] fundamentally undermined his sentence." *Id.* at 40.

Our decision in *Mullens* controls this case. Although Robinson did not receive a unanimous jury recommendation for death, we have held that Robinson made a valid waiver of that determination, and therefore Robinson's claim fails. *Cf. id.* at 38. Mullens was not entitled to relief because he made a valid waiver of jury factfinding. 197 So. 3d at 40 ("Mullens is not entitled to *relief* pursuant to *Hurst* [*v. Florida*].") (emphasis added). Furthermore, we have held that a subsequent change in law does not affect the validity of a prior, otherwise-valid waiver of a penalty-phase jury. *Mullens*, 197 So. 3d at 40; *see also State v. Silvia*, 235 So. 3d 349, 350-52 (Fla. 2018) (rejecting a claim that a waiver of postconviction proceedings must be reconsidered in light of *Hurst*). Because Robinson cannot challenge the validity of his original waiver, *see Robinson III*, 913 So. 2d at 523 n.8, 528, he cannot show cause why *Mullens* does not control the present case.

Conclusion

Based upon the foregoing, the decision of the postconviction court is hereby affirmed.

It is so ordered.

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

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED ON OR BEFORE DECEMBER 27, 2018. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED ON OR BEFORE JANUARY 2, 2019. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

I concur in result based on this Court's opinion in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), *cert. denied*, 137 S. Ct. 672 (2017), but adhere to my view that *Hurst*[2] should be retroactive without the cut-off date of the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).[3] In this case, because Robinson waived his right to a penalty phase jury, *Hurst* does not apply.

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2. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

3. *See Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Asay v. State* (*Asay V*), 210 So. 3d 1, 32 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 41 (2017).

An Appeal from the Circuit Court in and for Orange County,
Marc L. Lubet, Judge - Case No. 481994CF009210000AOX

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

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

Appendix B

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

CASE NO. 1994-CF-9210

STATE OF FLORIDA,
Plaintiff,

vs.

MICHAEL LEE ROBINSON,
Defendant.
_____/

ORDER DENYING SUCCESSIVE
MOTION TO VACATE DEATH SENTENCE

This matter came before the Court for consideration of Defendant Michael Lee Robinson's Successive Motion to Vacate Death Sentence, filed September 18, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. After reviewing the Motion, file, and record, together with the State's Response, filed October 9, 2017, and conducting a case management conference on October 27, 2017, the Court finds as follows.

Procedural History

On January 23, 1995, Mr. Robinson pled guilty to first-degree murder, and the Court imposed the death penalty on April 12, 1995. The Florida Supreme Court vacated the sentence and remanded, finding the trial judge was required to weigh and consider mitigating evidence even though Mr. Robinson had requested the death penalty and asked that no mitigating factors be considered; *Robinson v. State*, 684 So. 2d 175 (Fla. 1996).

Upon remand, Mr. Robinson attempted to withdraw his plea, but counsel's oral motion to this effect was denied. After a second penalty phase hearing, the Court again imposed the death penalty on August 15, 1997. The Florida Supreme Court affirmed; *Robinson v. State*, 761 So. 2d 269 (Fla. 1999), *cert. denied*, 529 U.S. 1057 (2000).

On February 28, 2001, Mr. Robinson filed his original Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend, followed by an Amended Motion on October 10, 2001. After conducting an evidentiary hearing on

January 29-31, 2003, the Court denied relief in an Order filed May 19, 2003. The Florida Supreme Court affirmed; *Robinson v. State*, 913 So. 2d 54 (Fla. 2005).

The instant Motion is filed pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016); the enactment of Chapter 2016-13 on March 7, 2016; and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); as well as *Perry v. State*, 210 So. 3d 630 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); and *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

Claim I: Mr. Robinson alleges his death sentence violates the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated. He argues he is entitled to the retroactive application of both decisions under the fundamental fairness doctrine articulated in *Mosley*, asserting that he has raised the *Ring* claim at every opportunity, including his initial postconviction motion, which pre-dated the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). He also argues he is entitled to retroactivity under state and federal law,[1] because *Hurst v. State* announced two substantive constitutional rules: (1) the Sixth Amendment requires a jury to decide whether aggravating factors proved beyond a reasonable doubt are sufficient to warrant the death penalty and whether they outweigh the mitigating circumstances, and (2) the Eighth Amendment requires the jury's fact-finding during penalty phase to be unanimous. Mr. Robinson recognizes the Florida Supreme Court's ruling in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), but argues his case should be decided on an individual basis and challenges the application of "partial retroactivity" based on the date when sentences were finalized.

[1] He cites, *inter alia, Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965); and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

This case is in a unique posture, because Mr. Robinson entered a plea and never had a penalty phase jury. He recognizes the Florida Supreme Court's ruling in *Mullens v. State*, 17 So. 3d 745 (Fla. 2016), holding that defendants who waived a penalty phase jury are not entitled to *Hurst* relief, but argues that while he waived this right during the initial sentencing proceeding, he did not waive it after the Florida Supreme Court remanded his case for resentencing. He also acknowledges that he challenged the lack of a penalty phase jury in Claim XI of his initial postconviction motion, and the Court denied the claim as procedurally barred because he had raised it on direct appeal. However, he asserts this ruling was incorrect because the colloquy at the time of his initial waiver was insufficient and the Florida Supreme Court did not rule on whether that waiver was valid.

This Court is bound by the Florida Supreme Court's rulings that *Hurst* "does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*." *Mosley v. State*, 210 So. 3d 1248, 1274 (Fla. 2016), *citing Asay v. State*, 210 So. 3d 1, 21-22 (Fla. 2016).

As for Defendant's challenge to the waiver of a jury for his second penalty phase, he raised this claim in his prior postconviction motion. It was denied, and the Florida Supreme Court affirmed that ruling, finding the issue had been raised on direct appeal. *Robinson v. State*, 913 So. 2d at 523, *citing Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999). Therefore, despite Defendant's assertion that his direct appeal involved only a challenge the denial of his motion to withdraw plea, the Court finds no legal basis to overcome the procedural bar with respect to this claim.

Furthermore, when the Florida Supreme Court reversed Defendant's original death sentence, it remanded the case "to the trial court to conduct a new penalty phase hearing before the judge alone." *Robinson v. State,* 684 So. 2d 175, 180 (Fla. 1996).

Finally, the Florida Supreme Court has specifically held – in cases to which *Hurst* otherwise applies – that a defendant who waives a penalty phase jury is not entitled to relief under *Hurst* because he "cannot subvert the right to jury fact-finding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016).

Claim II: Defendant alleges his death sentence violates the Eighth Amendment under *Hurst v. State* and should be vacated. He argues that "society's evolving standards of decency demand" that he be granted relief, as the required jury vote to support application of a death sentence has evolved from a bare majority, to 10-2, to unanimous.

This claim fails because, as set forth above, *Hurst* does not apply retroactively to Defendant, and the Florida Supreme Court has rejected Eighth Amendment challenges. *Hannon v. State*, SC17-1618, 2017 WL 4944899 (Fla. 2017), *citing Lambrix v. State*, 42 Fla. L. Weekly S833 (Fla. Sept. 29, 2017); *Asay v. State*, 224 So. 2d 695, (Fla. 2017); *Hitchcock v. State*, 42 Fla. L. Weekly S753 (Fla. Aug. 10, 2017).

Claim III: Defendant alleges his prior postconviction claims must be reheard and determined under a constitutional framework. In support, he cites rulings on newly discovered evidence in *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014), and *Swafford v. State*, 125 So. 3d 760, 775-776 (Fla. 2013).

As the State argues in its Response, a *Hurst* claim is not a claim of newly discovered evidence. Neither *Hurst* nor *Hildwin* nor *Swafford* resurrect previously denied postconviction claims, particularly those unrelated to the penalty phase. Furthermore, the Florida Supreme Court recently rejected an identical claim in *Hitchcock v. State*, 42 Fla. L. Weekly S753, n.2 (Fla. August 10, 2017).

Based on the foregoing, it is ORDERED AND ADJUDGED:

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

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

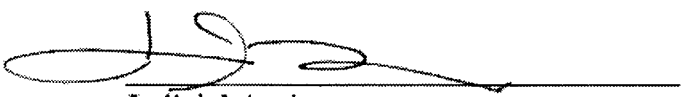
3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 8 day of November 2017.

MARC L. LUBET
Circuit Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Motion to Vacate Death Sentence has been provided this 8 day of November 2017 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorneys / interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.



Judicial Assistant

Assistant Capital Collateral Counsel:
Chelsea Rae Shirley, shirley@ccmr.state.fl.us
Maria E. DeLiberato, deliberato@ccmr.state.fl.us
Julissa R. Fontán, fontan@ccmr.state.fl.us
support@ccmr.state.fl.us

Assistant Attorney General:
Tayo Papoola
capapp@myfloridalegal.com

State Attorney
Kenneth Sloan Nunnelley, knunnelley@sao9.org
PCF@sao9.org

Appendix C

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

CASE NO. 1994-CF-9210

STATE OF FLORIDA,
Plaintiff,

vs.

MICHAEL LEE ROBINSON,
Defendant.
_____/

ORDER DENYING
MOTION FOR REHEARING

This matter came before the Court for consideration of Defendant Michael Lee Robinson's Motion for Rehearing, filed November 27, 2017, pursuant to Florida Rule of Criminal Procedure 3.851(f)(7).

Defendant first argues the Court's Order Denying Successive Motion to Vacate Death Sentence failed to address the fact that he raised Sixth Amendment claims before *Ring*[1] was issued by the United States Supreme Court. In support, he cites *Mosley v. State*, 209 So. 3d 1248, 1275 (Fla. 2016): "Accordingly, because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst,* which defined the effect of *Hurst v. Florida* to Mosley."

However, *Mosley* also specifically held that "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively **to that time**." *Id.* at 1279 (emphasis added). In other words,

[1] *Ring v. Arizona*, 536 U.S. 584 (2002)

"*Hurst v. Florida* derives from *Ring*." *Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016). Therefore, the Florida Supreme Court has consistently held that *Hurst v. Florida*, 136 S.Ct. 616 (2016), as interpreted in *Hurst v.* State, 202 So. 3d 40 (Fla. 2016), is not retroactive prior to June 24, 2002, the date that *Ring* was released. *Hannon v. State*, SC17-1618, 2017 WL 4944899 (Fla. Nov. 1, 2017), *citing, inter alia, Lambrix v. State*, 227 So. 3d 112 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). This Court is bound by that controlling authority. The fact that Defendant raised Sixth Amendment challenges prior to the issuance of *Ring* does not change this conclusion or provide a basis for relief.

Defendant also argues the Court failed to address his federal retroactivity claim, wherein he asserted that *Hurst* is retroactive under federal law because it announced substantive rules which must be applied retroactively under the Supremacy Clause.

Again, *Hurst* is an extension of *Ring*. Furthermore, *Ring* was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and both *Ring* and *Apprendi* have been classified as procedural rather than substantive. *State v. Perry*, 192 So. 3d 70, 75-76 (Fla. 5th DCA 2016); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017). This Court finds no authority to support relief based on the concept of federal retroactivity.

Next, Defendant argues the Court failed to consider the Florida Supreme Court's finding in *Hurst v. State* that a *Hurst* sentencing error has Eighth Amendment implications and finally, the Court failed to consider the Florida Supreme Court's opinion in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), finding that Florida's post-*Hurst* revision of the death penalty was still unconstitutional.

The Florida Supreme Court has rejected these claims, as well. *Lambrix*, 227 So. 3d at 113; *Asay*, 224 So. 3d at 702-703. "These are nothing more than arguments that *Hurst v.*

State should be applied retroactively to his death sentence, which became final prior *to Ring*." *Hitchcock*, 226 So. 3d at 217

Again, the Court concludes that it is bound by the Florida Supreme Court opinions cited herein to find that Defendant is not entitled to relief because *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to his case, which was final when *Ring v. Arizona* was issued in 2002. The arguments set forth in the instant Motion for Rehearing lack merit and therefore do not change this conclusion.

The Court further restates its finding that Defendant is not entitled to relief because he waived a penalty phase jury. *Mullens v. State*, 17 So. 3d 745 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016). *Robinson v. State*, 913 So. 2d 514, 523 (2005), *citing Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999).

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Motion for Rehearing is DENIED.

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

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

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 30 day of November 2017.

MARC L. LUBET
Circuit Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Motion for Rehearing has been provided this 30 day of November 2017 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorneys / interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

Judicial Assistant

Assistant Capital Collateral Counsel:
Chelsea Rae Shirley, shirley@ccmr.state.fl.us
Maria E. DeLiberato, deliberato@ccmr.state.fl.us
Julissa R. Fontán, fontan@ccmr.state.fl.us
support@ccmr.state.fl.us

Assistant Attorney General:
Tayo Papoola
capapp@myfloridalegal.com

State Attorney
Kenneth Sloan Nunnelley, knunnelley@sao9.org
PCF@sao9.org

Appendix D

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

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 1994-CF-009210**

MICHAEL LEE ROBINSON,

Defendant.
_____/

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

Defendant Michael Lee Robinson, through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of a change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, and the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, 210 So. 3d 630 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

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

The Circuit Court of the Ninth Judicial Circuit, Orange County, entered the judgments of conviction and sentence under consideration.

On January 23, 1995, Mr. Robinson pled guilty to first-degree murder and, after waiving a penalty phase jury, the trial court imposed the death penalty on April 12, 1995. Mr. Robinson requested the death penalty and asked that no mitigating factors be considered. On appeal, the Florida Supreme Court vacated his sentence and remanded because "the trial court failed to consider and weigh evidence of substantial mitigation found in the record." *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). In the opinion, the Florida Supreme Court remanded the case "to the trial court to conduct a new penalty phase hearing before the judge alone." *Id.* at 180. The Court did not remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), which would not have granted Mr. Robinson the same rights as do plenary sentencing proceedings. Rather, the Court remanded for a new, plenary, penalty phase hearing. Upon remand, Mr. Robinson attempted to withdraw his guilty plea, but counsel's oral motion to withdraw was

denied. Further, Mr. Robinson was not given the option of having a penalty phase jury, even though Mr. Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 So. 2d 269, 275 n. 5 (Fla. 1999). The Florida Supreme Court affirmed the conviction and sentence. *Id.* The Supreme Court of the United States denied certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057 (2000).

On February 21, 2001, Mr. Robinson filed a Motion to Vacate Judgment and Sentence with Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.850. Mr. Robinson filed his final amended Rule 3.850 motion on October 3, 2001. The circuit court held a *Huff*[1] Hearing on June 7, 2002. An evidentiary hearing was conducted on January 29-30, 2002. A final order denying relief was issued on May 15, 2003. The Florida Supreme Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Robinson v. State*, 913 So. 2d 514 (Fla. 2005).

Thereafter, Mr. Robinson filed a timely Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. *Robinson v. Secretary Department of Corrections*, District Court Case No. 6:05-cv-01808-JA-KRS. The District Court denied his habeas petition on November 26, 2008. He filed a timely Notice of Appeal and Certificate of Appealability before the United States Court of Appeals for the Eleventh Circuit on May 6, 2009, which was subsequently denied.

2. Issues raised on appeal and disposition thereof.

The following issues were raised in Mr. Robinson's first direct appeal:

1. Trial court erred by not considering valid mitigation in violation of *Farr v. State*, 621 So. 2d 1368 (Fla. 1993) (granted, reversed);
2. Trial court erred in finding that the pecuniary gain aggravator was proven beyond a reasonable doubt (denied);
3. Trial court erred in finding that the avoid arrest aggravator was proven beyond a reasonable doubt (denied);
4. Trial court erred in finding that the cold, calculated, and premeditated aggravator was proven beyond a reasonable doubt (denied); and
5. The Florida Supreme Court should recede from *Hamblen v. State*, 527 So. 2d 800 (Fla. 1998) (denied).

The following issues were raised in Mr. Robinson's second direct appeal:

1. Trial court erred in denying Robinson's motion to withdraw his guilty plea (denied);

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

2. Trial court erred in denying Robinson's motion for neurological testing (denied);
3. Trial judge made prejudicial comments on the record and denied Robinson additional funds with which to investigate mitigating evidence (denied);
4. The sentence of death is disproportionate (denied);
5. Trial court erred in finding the murder was committed for pecuniary gain (denied);
6. Trial court erred in finding the murder was committed to avoid arrest (denied); and
7. Trial court erred in finding the murder was cold, calculated and premeditated (denied).

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

A. *Motion to Vacate Judgment and Sentence*:

1. Mr. Robinson was denied his right to effective representation by the short time period and lack of funding available to fully investigate and prepare his post-conviction pleading (denied);
2. Mr. Robinson was denied his rights to due process and equal protection because access to the files and records pertaining to Mr. Robinson's case in the possession of certain state agencies have been withheld (denied);
3. Mr. Robinson's conviction is materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and/or improper rulings of the trial court (denied);
4. Mr. Robinson was denied effective assistance of counsel at the sentencing phase of his trial (denied);
5. Mr. Robinson was denied his rights under *Ake v. Oklahoma* (denied);
6. Mr. Robinson is innocent (denied);
7. Mr. Robinson's death sentence is invalid because Florida law shifts the burden to him to prove that death was inappropriate and because the trial court presumed death (denied);
8. Mr. Robinson's death sentence is premised upon fundamental error because Florida's statute setting forth the aggravating factors is facially vague and overbroad (denied);
9. Florida's capital sentencing statute is unconstitutional on its face and as applied (denied);
10. Mr. Robinson is insane (denied);
11. Mr. Robinson did not voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury, and the trial court's inquiry was constitutionally inadequate (denied);
12. The sentencing court precluded Mr. Robinson from presenting and the sentencing court from considering, evidence of mitigation (denied);
13. Execution by electrocution or lethal injection is cruel and unusual punishment (denied);
14. Cumulative error (denied);
15. Trial court erred by not finding or considering the mitigating circumstances set out in the record (denied);
16. Mr. Robinson was denied his right to a fair plea and sentencing before an impartial judge (denied); and
17. Trial court's denial of a PET Scan violated the 5th, 6th, and 14th Amendments (denied).

B. State Habeas Petition

1. The Florida Supreme Court's decision on direct appeal precluding Mr. Robinson from seeking a jury penalty phase was error, and appellate counsel unreasonably failed to bring this matter to the court's attention, thereby rendering ineffective assistance of counsel (denied); and
2. Florida's capital sentencing statute violates the Sixth and Fourteenth Amendments (denied).

B. *Claims not Raised in Previous Motions*:

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies.

On October 14, 2016, the Florida Supreme Court issued its decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida.* In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed. As the Florida Supreme Court explained in *Hurst*, "jury unanimity further(s) the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses." *Hurst v. State*, 202 So.3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that were present in the case. If a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful, even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst v. State*, 202 So.3d at 62, n. 18.

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

1) Those whose sentences became final after the Supreme Court issued its decision in *Ring*[2]. Such defendants are entitled to retroactive application as a group, regardless of preservation. See *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Because his direct appeal proceedings concluded in 2000, see *Robinson v. Florida*, 529 U.S. 1057 (2000) (denying certiorari), Mr. Robinson is outside this group.

2) Those who specifically preserved the *Ring* issue. *See Mosely*, 209 So. 3d at 1274-76 (citing *James v. State,* 615 So. 2d 668 (Fla. 1993)). Considerations of fundamental fairness dictate the application of the requirements contained in *Hurst v. Florida* to this class of defendant. Mr. Robinson is within this class. Because Mr. Robinson "raised a *Ring* claim at his first opportunity and was then rejected at every turn ... fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*," to him. *Mosley* at 1275. *See also*, *Hitchcock v. State*, -- So. 3d --, 2017 WL 3431500, at *2 (Fla. Aug. 10, 2017)(Lewis concurrence)(internal citations omitted)("Preservation of the issue is perhaps the most basic tenet of appellate review, and this Court should be particularly cognizant of preservation issues for capital defendants...those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in Hurst are entitled to consideration of that constitutional challenge.").

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

4. The nature of the relief sought.

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

5. Claims for which an evidentiary hearing is sought.

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[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

CLAIM I

Mr. Robinson's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated.

This claim is evidence by the following:

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

This motion is filed within one year of the issuance of *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, all of which established new Florida law. The claims presented herein could not have been presented before the change in Florida law that these cases and statutory amendment brought about. The claims were simply not ripe before because the basis for the Defendant's claims did not exist before the change in Florida law resulting from *Hurst v. Florida*. Accordingly, this motion is timely.

The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who has been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating

factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

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

1. The *Hurst* decisions apply retroactively to Mr. Robinson under the equitable "fundamental fairness" retroactivity doctrine, which the Florida Supreme Court has applied in cases such as *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). In *Mosley*, the Court explained that although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which had been applied in cases like *James*. *See Mosley*, 209 So. 3d at 1274-76. Unlike the *Mosley* Court's *Witt* analysis, which considered whether Mosley's sentence became final after the *Ring* decision as a factor in assessing *Hurst* retroactivity, the Court's fundamental fairness analysis made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* Rather, the *Mosley* Court's separate fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Florida Supreme Court's flawed pre-*Hurst* law. *Id.* at 1275.

2. Although *Mosley* was a post-*Ring* case, the Court's fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. *See Id.* at 1276 n. 13. In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness, as measured by this Court on a case-by-case basis.

3. In assessing fundamental fairness in the retroactivity context, the *Mosley* Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst v. Florida* and *Hurst v. State* were decided. *See Id.* at 1274-75. In Mosley's

case, the Court looked to whether he raised a challenge under *Ring* "at his first opportunity." *See Id.* If Mosley had raised such a challenge, the Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida's capital sentence scheme even before they were recognized in the *Hurst* decisions. *See Id.* The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State's interests in the finality of death sentences.

4. In Mr. Robinson's case the *Hurst* decisions should apply retroactively under the fundamental fairness doctrine. Although his direct appeal and initial 3.850 Motion were pre-*Ring*, Mr. Robinson's initial post-conviction motion in the circuit court raised a *Ring*-type claim. Without the benefit of the *Ring* or *Hurst* decisions, Mr. Robinson raised a challenge to Florida's capital sentencing scheme during post-conviction. Mr. Robinson alleged Florida's capital sentencing procedure did not have the independent reweighing of aggravating and mitigating circumstances envisioned in *Proffitt v. State*, 428 U.S. 242 (1976) and now required under *Hurst v. Florida* and *Hurst v. State*. This effort constituted a pre-*Ring* effort to raise *Ring*-like challenges. Later, in his Petition for Writ of Habeas Corpus to the Florida Supreme Court, Mr. Robinson raised a *Ring* claim.

5. In this case, the interests of finality must yield to fundamental fairness. Mr. Robinson, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst v. Florida* and *Hurst v. State*, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Mr. Robinson "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 209 So. 3d at 1283. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the *Hurst* decisions in this case.

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

6. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and

substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.[3] Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id. Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that provides for judges, not juries, make the factual findings that are statutorily required to authorize the imposition of a death sentence.

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

8. As applied to Mr. Robinson, the first *Stovall/Linkletter* factor – the purpose to be served by the new rule – weighs heavily in favor of retroactivity. The right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 210 So. 3d at 18 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life").

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[3] Mr. Robinson recognizes that *Asay v. State*,-- So. 3d --. 2017 WL 3472836 (Fla. August 14, 2017) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst* under a *Witt* analysis. But, Mr. Robinson's case should be decided on an individual basis. Moreover, the United States and Florida Constitutions cannot tolerate the concept of "partial retroactivity," where similarly situated defendants are granted or denied the benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. To deny Mr. Robinson the retroactive effect of *Hurst* deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution. *See also*, *Hitchcock v. State*, -- So. 3d --, 2017 WL 3431500, at *2 (Fla. Aug. 10, 2017)(Lewis concurrence & Pariente dissent)

9. The second *Stovall/Linkletter* factor – extent of reliance on the old rule – also weighs in favor of applying those decisions retroactively. This factor requires examination of the "extent to which a condemned practice infect(ed) the integrity of the truth-determining process at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Florida's unconstitutional sentencing scheme has always been unconstitutional and systemically infected the truth-determining process at penalty-phase proceedings since the statute was enacted – including Mr. Robinson's trial. Accordingly, the second factor weighs in favor of retroactivity.

10. Finally, the third *Stovall/Linkletter* factor – effect on administration of justice – also weighs in favor of retroactivity. This factor does not weigh against retroactivity unless it will, "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt v. State*, 387 So. 2d 922, 929–30 (Fla. 1980). There can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants will "destroy" the judiciary.

11. Undoubtedly, retroactive application will have slightly more of an impact on the administration of justice but that is not the test. Retroactive application of new rules affecting much larger populations have been approved. *See e.g. Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

12. As a result, retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929).

13. Anything less than full retroactivity leads to disparate treatment among Florida capital defendants. See *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (new penalty phases on 1974 murders); *State v. Dougan*, 202 So.3d 363 (Fla. 2016)(granting a new trial in a 1974 homicide); *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)(granting a new trial in a 1985 homicide); *Cardona v. State*, 185 So.3d 514 (Fla. 2016)(granting a new trial in a 1990 homicide), and *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016)(on a direct appeal from a resentencing, the Court remand for a new penalty phase because of *Hurst* error in a 1981 triple homicide).

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

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

15. Mr. Robinson is also entitled to the retroactive effect of *Hurst* under federal law. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").

16. That case arose when Montgomery launched state post-conviction proceedings seeking the benefit of *Miller v. Alabama* and the Louisiana Supreme Court (in contrast to the Florida Supreme Court in *Falcon*) determined that *Miller* was not retroactive under its state retroactivity doctrines. The United States Supreme Court held that determination made no difference to Montgomery's entitlement to the benefits of *Miller*. Because the rule of *Miller* was substantive, Louisiana was required to apply it on state post-conviction review.

17. In *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. *First*, the Florida Supreme Court held that the Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. *Second*, the Florida Supreme Court determined that the Eighth Amendment required that the jury's fact-finding during the penalty phase be unanimous. The function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. That makes the rule substantive.

18. *Hurst v. State* held that the "specific findings required to be made by the jury include the existence

of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Such findings are manifestly substantive.[4] See *Montgomery v. Louisiana*, 136 S.Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).

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

D. Mr. Robinson never waived his right to a penalty phase jury and thus is entitled to the benefits of both *Hurst* decisions.

1. The importance of unanimous jury findings for a death sentence to be constitutional is evident from *Hurst v. Florida*, *Hurst v. State*, and *Perry*. *Hurst v. State* held that the "specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d at 44. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Because the Sixth Amendment rules announced in *Hurst v. State* are substantive, Mr. Robinson is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state

[4]In contrast, in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989)—the basis of *Hurst v. Florida*—was not retroactive on federal collateral review because the requirement that the jury rather than the judge make findings as to whether a defendant had a prior violent felony aggravator was procedural rather than substantive. *Summerlin* did not review a capital sentencing statute, like Florida's, that required the jury not only to make the fact-finding regarding the applicable aggravators, but also required the jury to make the finding as to whether the aggravators were *sufficient* to impose death.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard which the Supreme Court has always regarded as substantive. See *Powell v. Delaware*, 153 A. 3d 69, 74-75 (Del. 2016)(*Schriro* only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, the applicable burden of proof).

postconviction proceeding.

2. Mr. Robinson asserts unequivocally that *Hurst* should be applied with complete retroactivity and that any decision to the contrary is a violation of his rights. Mr. Robinson maintains that partial retroactivity is arbitrary and capricious. Mr. Robinson recognizes that *Mullens v. State*, 17 So. 3d 745 (Fla. 2016), suggests defendants who waived a jury are not entitled to *Hurst* relief. However, Mr. Robinson never waived his right to a penalty jury after his case was remanded for a new penalty phase.

3. Regardless, the Florida Supreme Court created an arbitrary class of defendants in *Mullens* that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required by the Supreme Court of the United States in *Ring* and *Hurst*, simply because they waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. The Florida Supreme Court held that Mullens could not "avail himself of relief" pursuant to *Hurst v. Florida* because he waived an advisory jury recommendation for penalty phase and elected to be sentenced by the judge. *See Id.* at 38-40. The Court cited *Blakely v. Washington*, 542 U.S. 296, 310 (2004), and concluded, "Nothing prevents a defendant from waiving his *Apprendi* rights. . . . If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." 197 So. 3d at 38. However, Mr. Robinson never waived his right to a penalty phase jury during his second trial. The circuit court and the Florida Supreme Court inappropriately and unconstitutionally denied Mr. Robinson his right to a jury of his peers.

4. The Sixth amendment to the United States Constitution provides that a defendant has the fundamental right to a jury trial. *See Duncan v. Louisiana,* 391 U.S. 145 (1968). Nevertheless, fundamental constitutional rights can be waived when a defendant so chooses. *See Boykin v. Alabama,* 395 U.S. 238 (1969). However, an effective waiver of a constitutional right must be voluntary, knowing, and intelligent. *See Brady v. United States,* 397 U.S. 742 (1970). Further, the constitutionality or appropriateness of a waiver of a constitutional right, such as Mr. Robinson's Sixth, Fifth, and Fourteenth Amendment rights, must be unequivocal. The Supreme Court of the United States in *Faretta v. California*,422 U.S. 806 (1975)

demonstrated the detailed inquiry that is necessary to determine whether a criminal defendant has unequivocally waived his right to counsel. Specifically, our highest Court held as follows:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused ***must 'knowingly and intelligently' forgo those relinquished benefits***. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, ***he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'*** *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242.
>
> Here, weeks before trial, Faretta ***clearly and unequivocally*** declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure.

Faretta, 422 U.S. at 835-36 (internal footnote omitted) (emphasis added).

5. It should be noted just how detailed the colloquy was by the Court in *Faretta* to make sure that the defendant was aware of not only his rights but the Court also articulated the dangers of waiving his right. *See Pasha v. State*, 39 So. 3d 1259, 1261 (Fla. 2010) (quoting *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008) ("It is clear that '[b]efore the trial court can make a decision whether to permit the defendant to proceed pro se, the defendant's request for self-representation must be unequivocal.'").

6. The importance of an appropriate and detailed colloquy cannot be understated when assessing whether a waiver of a constitutional right is valid. The Florida Supreme Court clearly rejected an attorney's written waiver on behalf of his client to waive his right to a jury trial because the record did not demonstrate that the waiver was knowing, voluntary, and intelligent. *See State v. Upton*, 658 So. 2d 86 (Fla. 1995). The Florida Supreme Court held that:

> [i]n the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly, voluntarily and intelligently waived his right to a trial by jury. We reject the State's alternative contention that the case

> should be remanded for an evidentiary hearing to determine whether Upton agreed with his attorney's waiver of a jury trial. *See Williams,* 440 So.2d at 1291.

Upton, 658 So. 2d at 88, *approved sub nom. Johnson v. State*, 994 So. 2d 960, 963 (Fla. 2008) ("an oral waiver, which is preceded by a proper colloquy ***during which the trial judge focuses on the value of a jury trial and provides a full explanation of the consequences of a waiver***, *see Tucker,* 559 So.2d at 220, is necessary to constitute a sufficient waiver. Further, a defendant's silence does not establish a valid waiver of the right to a jury trial.").

7. When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of the right, having been informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Mr. Robinson's colloquy during his first trial. Nor did Mr. Robinson ever knowingly, voluntarily and intelligently waive his right to a penalty phase jury after the Florida Supreme Court remanded his case for a new penalty phase.

8. During Mr. Robinson's first trial, the circuit court conducted a limited colloquy as to Mr. Robinson's guilty plea but never conducted a colloquy as to his waiving a penalty phase jury. ROA at 5-36, 41-42. The only questioning regarding Mr. Robinson waiving his right to a penalty phase jury was as follows:

Court:	Are the defense and the state waiving any jury for the penalty phase?
Mr. Culhan:	The Florida Supreme Court has recently said the state has nothing to say about that.
Court:	Then the defense?
Mr. Irwin:	We would be waiving the jury for the penalty phase, judge.
Court:	Have you talked to him about that?
Mr. Irwin:	Yes, we have.
Defendant:	I have stated that earlier.
Court:	You don't want a jury for the penalty phase?
Defendant:	I don't feel I need it. I think if you – contingent on - can you return a penalty phase of death by that?
Court:	I've done it before.
Defendant:	That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.
Court:	To recommend a sentence?
Defendant:	That is correct.

*****

Court:	Mr. Robinson has already pled to first degree murder and I understand he did not want to have a jury for the recommendation. Is that still the case?
Mr. Irwin:	That's correct, your honor.
Court:	Mr. Robinson, is that true? You don't want a jury?
Defendant:	Yes, ma'am, that's correct.
Court:	And have you talked to your lawyers about that again and you still think that that's the way you want to go, without a jury?
Defendant:	Yes, ma'am. They came to the jail yesterday and interviewed me and we Discussed it and that's correct, I still wish to go without a jury.

ROA at 32-33, 41-42.

9. Unlike in *Mullens*, it cannot be said that the above colloquy demonstrated that Mr. Robinson was "made aware of the dangers and disadvantages of [waiving a jury], so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835-36 (1975)(internal citations omitted). *See*, *Mullens v. State*, 197 So. 3d 16, 39 (Fla. 2016), reh'g denied, cert. denied, 137 S. Ct. 672 (2017)("The trial court conducted a thorough colloquy and asked Mullens if he understood the right that he was relinquishing and that he was subject to sentences of either death or life imprisonment."). This is especially evident now in our post-*Hurst* landscape.

10. Second, after the Florida Supreme Court vacated and remanded Mr. Robinson's case for a new penalty phase, he never waived his right to a penalty phase jury, and neither trial counsel nor the circuit court ever asked Mr. Robinson on the record whether he wanted a penalty phase jury.

11. Later, Mr. Robinson challenged the lack of a penalty phase jury in his initial Motion to Vacate Judgment and Sentence in Claim XI. The trial court denied this claim stating that it was procedurally barred because it was raised on direct appeal and ruled upon by the Florida Supreme Court. However, this is inaccurate. Mr. Robinson only challenged the denial of his motion to withdraw his *guilty plea* on direct appeal – Mr. Robinson did not challenge the lack of a penalty phase jury. *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999). The Florida Supreme Court never ruled on whether or not his waiver of a *penalty phase jury* was valid – or if he ever waived one at all.

12. Mr. Robinson tried again to challenge his non-waiver of a penalty phase jury in his state habeas petition but this too was wrongly denied by the Florida Supreme Court because it found that this issue was previously resolved on appeal. *Robinson*, 913 So. 2d 514, 523 (Fla. 2005). However, as stated previously,

this issue was not previously raised on appeal – only the prior challenge to his guilty plea was raised. Thus, Mr. Robinson did properly raise this issue and it was incorrectly dismissed by the circuit court and the Florida Supreme Court.

13. As a result, not only did Mr. Robinson never waive his right to a penalty phase jury, but no appellate court has ever reviewed this issue. And, since Mr. Robinson never waived his right to a penalty phase jury, he is entitled to relief under *Hurst*.

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

1. The procedure employed when Mr. Robinson received his death sentence deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury's verdict authorizing a death sentence to be unanimous or else a life sentence is required, rather than a judge imposed sentence.

2. Instead, Mr. Robinson was completely denied any jury-fact finding.

3. The error in Mr. Robinson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Mr. Robinson's death sentence must be vacated and a resentencing ordered.

Conclusion

Notwithstanding the insufficient initial colloquy at Mr. Robinson's first penalty phase or his non-waiver during his second penalty phase, Mr. Robinson cannot waive a constitutional right that should have been afforded to him and every capital defendant. Now that a unanimous jury is required to sentence a defendant to death, the conversations and assessments between counsel and capital defendants changes dramatically. Moreover, the colloquy required by a court in cases of waivers will also evolve. *Hurst* will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; the jury will make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis because the landscape of *voir dire* and death qualification, pre-

trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

As the Florida Supreme Court explained in *Hurst v. State*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

Hurst, 202 So. 3d at 57-58.

Mr. Robinson never had the constitutional benefit of a penalty phase jury to return a verdict making findings of fact. There is no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if the jurors would have unanimously found the aggravators sufficient for death, or if the jurors would have unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they individually carried the immense responsibility of whether a death sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all important considerations for a conversation regarding waiving a jury. Reviewing courts cannot speculate as to what the findings or vote would be if Mr. Robinson was allowed a constitutional jury sentencing.

Consideration must also be given to the fact that trial counsel would have strategized and advised Mr. Robinson differently under *Hurst v. Florida* and the resulting new Florida law, now that counsel only needs to convince one of twelve jurors, less than nine percent of the fact finders, to save a defendant's life.

Further, it is more likely than not that at least one juror would not join in a death recommendation at resentencing. Mr. Robinson requests an evidentiary hearing regarding this claim in order to present the testimony of trial counsel, Michael L. Irwin and Mark Bender, and an expert death penalty counsel regarding the effect that the unconstitutional death penalty statute had on the advice trial counsel gave to Mr. Robinson, and on Mr. Robinson's decision whether to waive his right to a penalty phase jury, and also to consider the evidence a jury would have heard in a constitutional capital sentencing scheme pursuant to Chapter 2017-1. An evidentiary hearing is appropriate because the *Hurst* decision would have affected strategy and decision-making in all aspects of Mr. Robinson's case, including but not limited to: waiver of rights, and the investigation and presentation of mitigation.

Mr. Robinson's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, *Hurst v. Florida* and *Hurst v. State*. The *Hurst* error in Mr. Robinson's case warrants relief.

CLAIM II

Mr. Robinson's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and should be vacated.

This claim is evidenced by the following:

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

2. Society's evolving standards of decency demand that Mr. Robinson be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to unanimous. In *Hurst*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed." 202 So. 3d at 61. Quoting the United States Supreme Court, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" 202 So. 3d at 61 (quoting *Atkins v. Virginia,* 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989)). Then from a review of the capital sentencing

laws throughout the United States, the Court in *Hurst* found that a national consensus reflecting society's evolving standards of decency was apparent:

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

202 So. 3d at 61. Accordingly, the Court in *Hurst* concluded:

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

202 So. 3d at 63. *See Hurst*, 202 So. 3d at 73 (Pariente, J., concurring); *see also See Powell v. Delaware*, 153 A. 3d 69 (Del. 2016).

3. A capital defendant's life no longer lies in the hands of a bare majority; it lies in the hands of twelve individuals. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment. Therefore, Mr.

Robinson must be granted relief and the opportunity to make a constitutional decision regarding his waiver of a constitutional jury sentencing. It is arbitrary that a defendant who was convicted of triple murders with an eleven-to-one vote receives relief, while Mr. Robinson is denied the same opportunity. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring* or *Hurst v. Florida*-related error is harmless." *Id.* "We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida.*" *Id.*). To deny this right to Mr. Robinson would be manifest injustice and a violation of his equal protection rights. *See* U.S. Const. amend. XIV.

4. Failing to apply *Hurst* retroactively to Mr. Robinson, especially where he raised a *Ring*-type claim at his first opportunity, would be a violation of his due process and equal protection rights under the federal constitution and would result in a death sentence that is arbitrary and capricious in violation of the Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution.

5. Lastly, Mr. Robinson's death sentence should be vacated because it was obtained in violation of the Florida Constitution. On remand in *Hurst v. State*, the Florida Supreme 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. In addition to Florida's jury trial right, the Florida Supreme Court found that the Eighth Amendment's evolving standards of decency required and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact- finding. *Hurst v. State*, 202 So. 3d at 59–60.

6. The increase in penalty imposed on Mr. Robinson was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." This was a further violation of Florida Constitution.

7. Mr. Robinson had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr.

Robinson's death sentences based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges...

8. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). Because the State proceeded against Mr. Robinson under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Robinson. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Robinson was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Robinson was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment. This Court should vacate Mr. Robinson's death sentence.

CLAIM III

The Denial of Mr. Robinson's Prior Postconviction Claims Must Be Reheard And Determined Under A Constitutional Framework.

This claim is evidenced by the following:

1. All other factual allegations in this motion and its attachments and in Mr. Robinson's previous motions to vacate, and all evidence presented by him during the evidentiary hearing are incorporated herein by specific reference.

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

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

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial or resentencing must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a death sentence and unanimously determine that the aggravators outweigh the mitigating factors. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

3. This is new Florida law that did not exist when Mr. Robinson previously presented his original 3.850/3.851 *Strickland* claim. Accordingly before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Mr. Robinson could not present his claim as set forth herein because the new law that would govern any resentencing ordered in Mr. Robinson's case was previously unavailable. Accordingly, Mr. Robinson's previously presented claims must be reevaluated in light of the new Florida law. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So.3d 40, 59. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). Thus, reliability of Florida death

sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. Before executions are carried out in case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* claims, *Brady* claims, and/or newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particular since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

5. This Court must re-visit and re-evaluate the rejection of Mr. Robinson's previously presented *Strickland* claim in light of the new Florida law which would govern at a resentencing. When such a re-evaluation is conducted, it is apparent that the outcome would probably be different and that Mr. Robinson would likely receive a binding life recommendation from the jury.

6. Rule 3.851 relief is warranted. Mr. Robinson's death sentences should be vacated and a new penalty phase ordered.

CONCLUSION

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

6. The Names, Addresses, and Telephone Numbers of All Witnesses Supporting the Claim Who Are Available To Testify At an Evidentiary Hearing.

Terence Michael Lenamon
Lenamon Law
245 SE 1st St Ste 404
Miami, FL 33131-1913
Office: 305-373-9911

Mark C Bender
209 E Ridgewood St
Orlando, FL 32801-1926
Office: 407-246-0100

Michael Irwin
200 Ernestine St
Orlando, FL 32801-3622
Office: 352-221-0485

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

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that discussions with Mr. Robinson of this motion and its contents has occurred. Counsel has endeavored to fully discuss and explain the contents of this motion with Mr. Robinson, and that counsel to the best of her ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

CERTIFICATE OF SERVICE

We hereby certify that the foregoing has been served electronically upon the Clerk of the Circuit Court, the Honorable Marc L. Lubet, Circuit Judge (ctjakd2@ocnjcc.org); The Office of the Attorney General (capapp@myfloridalegal.com) and The State Attorney's Office for the Ninth Judicial Circuit (pcf@sao9.org and division11@sao9.org); on this 18th day of September, 2017.

Respectfully submitted,

/s/ Chelsea Rae Shirley
Chelsea Rae Shirley
Florida Bar. No. 112901
Assistant Capital Collateral Counsel
Shirley@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
deliberato@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us

Counsel for Mr. Robinson

Appendix E

Filing # 64572911 E-Filed 11/27/2017 08:39:53 AM

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

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 1994-CF-009210**

MICHAEL LEE ROBINSON,

Defendant.
_____/

MOTION FOR REHEARING

Defendant, MICHAEL ROBINSON, through undersigned counsel, files this motion for rehearing pursuant to Fl. R. Crim. Proc. 3.851(f)(7) and hereby moves this Honorable Court to reconsider its order of November 8, 2017, denying Defendant's Successive Motion to Vacate Death Sentence ("Successive Motion"). By this motion, the Defendant submits that the Court has overlooked and/or misapprehended points of law and facts critical to the resolution of the claims presented in his Successive Motion and discussed below. All claims for relief previously presented to the Court are specifically argued again, no claim previously raised is hereby abandoned. In support thereof, Mr. Robinson states as follows:

1. Mr. Robinson is a prisoner under sentence of death.

2. On September 18, 2017, Mr. Robinson filed a Successive Motion based on the United States Supreme Court and the Florida Supreme Court's decisions in *Hurst v. Florida*[1], *Hurst v. State*[2], *Mosley*[3], and *Asay*[4].

3. The State filed a response on October 9, 2017.

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[3] *Mosley v. State*, 209 So.3d 1248 (Fla. 2016).
[4] *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

4. This Court held a case management conference on October 27, 2017, and heard legal arguments from both parties.

5. On November 8, 2017, this Court issued a final order denying Mr. Robinson's Successive Motion.

6. This Court's order fails to address the fact that in Mr. Robinson's Successive Motion, he has pled that he raised Sixth Amendment claims before *Ring*[5] was issued by the United States Supreme Court. As such, Mr. Robinson is not asking this Court to ignore the recent Florida Supreme Court opinions, but to take into account the Florida Supreme Court's own language and distinction mentioned in it opinions. In *Mosley*, 209 So. 3d at 1275, the Court found:

> While this Court did not employ a standard retroactivity analysis in *James*[6], the basis for granting relief was that of fundamental fairness. *Id.* This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id.*
>
> The situation presented by the United States Supreme Court's holding in *Hurst v. Florida* is not only analogous to the situation presented in *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*. *Id.*

> Accordingly, because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley.

7. Mosley's direct appeal was decided after *Ring*. However, further along in the *Mosley* opinion at footnote 13, the Florida Supreme Court drops any distinction between *Ring* claims and refers to the type of claim which *Ring* represents, a Sixth Amendment claim. The Court explained:

> The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt*[7] analysis is that under *James*, a defendant or his lawyer would have had to timely raise the constitutional argument, in this case a

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[5] *Ring v. Arizona*, 536 U.S. 584 (2002).
[6] *James v. State*, 615 So.2d 668, 669 (Fla. 1993).
[7] *Witt v. State,* 387 So. 2d 922 (Fla. 1980).

> Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument. In this case, we determine that Mosley would be entitled to retroactive application of *Hurst* under either approach.

Mosley, 209 So. 3d at 1276.

8. *James* is still good law as it continues to be recognized and cited by the Florida Supreme Court. Accordingly, fundamental fairness would require that Mr. Robinson's Successive Motion be considered timely and his claims determined on their merits. Like Mosley, Mr. Robinson raised the same claims that were held to be valid in *Ring* and in *Hurst*, but he was incorrectly denied relief. The interests of finality must yield to fundamental fairness.

9. The Order also fails to address the federal retroactivity argument made by Mr. Robinson – just as the Florida Supreme Court has thus far failed to address or reject any federal retroactivity arguments in regards to *Hurst*. *Hurst* is retroactive under federal law because it announced substantive rules which must be applied retroactively under the Supremacy Clause. *Hurst* determined that a defendant sentenced to death without a jury unanimously finding all statutorily necessary facts is an unconstitutional penalty. Although *Hurst* did not bar capital punishment for all defendants, it did bar the sentence for all but the rarest of defendants. *Hurst* drew a line between those defendants whose murders do not rise to the most aggravated and least mitigated, and those whose capital offenses do. And, "the fact that the [death penalty] could still be a proportionate sentence for the latter kind of offender does not mean that all other [capital defendants] imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Montgomery v. Louisiana*, 136 S. Ct.718, 734 (2016).

10. In its Order summarily denying the Successive Motion, this Court also assumes that the issue of retroactivity related to *Hurst* has been settled and decided. That is error. On September

25, 2017, James E. Hitchock filed a petition for writ of certiorari to the United States Supreme Court arguing that the limited retroactive application of both *Hurst* decisions violated the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing. On October 30, 2017, the Office of the Attorney General filed their Brief in Opposition. The case is set for conference on December 1, 2017. This writ challenges the retroactive effect of *Hurst* to pre-*Ring* cases. The landscape of the law in this issue is far from settled.

11. Additionally, this Court's ruling also fails to consider the Florida Supreme Court's finding in *Hurst v. State*, which held that a *Hurst* sentencing error has Eighth Amendment implications. The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment. The Florida Supreme Court has not addressed the retroactive application of *Hurst v. State* in light of this sentencing error also violating the Eighth Amendment.

12. In *Hurst v. State*, the Florida Supreme Court held:

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended *verdict* resulting in a death sentence is required under the Eighth Amendment. (Emphasis added)....The 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. (FNs omitted) ... 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.

202 So. 3d at 59-60 (emphasis added).

13. Mr. Robinson's sentence was not the product of *any* jury findings or verdict – let alone

a unanimous one. His sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. A new penalty phase jury was never empaneled after the Florida Supreme Court remanded Mr. Robinson's case on direct appeal and Mr. Robinson never waived his right to a penalty phase jury during this new proceeding. Thus, it cannot be said that Mr. Robinson's sentence was based on a "unanimous jury sentencing recommendation, when made in conjunction with the other critical findings unanimously found by the jury." *Id.* Mr. Robinson had no jury sentence him to death.

14. The retroactivity of the *Hurst* opinions should be decided favorably for Mr. Robinson when considered as a violation of the Eighth Amendment, as well as the Sixth Amendment.

15. Finally, this Court's summary denial of Mr. Robinson's motion fails to consider the Florida Supreme Court's opinion in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), where the Florida Supreme Court found Florida's post-*Hurst* revision of the death penalty statute was still unconstitutional after reviewing the statute in light of the its opinion in *Hurst* and the Florida Constitution. The Florida Supreme Court 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. [fn4] *Hurst*, SC12-1947, slip op. at 4. 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.

Perry, 210 So. 3d at 633 (emphasis added).

16. Importantly, Footnote 4 of *Perry* states, "In *Hurst*, we also decided the requirements of unanimity under both the Sixth and Eighth Amendments to the United States Constitution, but our basic reasoning rests on Florida's independent constitutional right to trial by jury. Art. I, § 22, Fla.

Const." Therefore, it has always been a requirement under Florida jurisprudence that juries must return unanimous verdicts. Thus, retroactivity is not an issue for Mr. Robinson, whose case does not pre-date the Florida Constitution.

WHEREFORE, Mr. Robinson asks this Court to reconsider the denial of his Successive Motion, and to grant him a new penalty phase.

CERTIFICATE OF SERVICE

We hereby certify that the foregoing has been served electronically upon the Clerk of the Circuit Court, Office of the Assistant Attorney General Tayo Popoola (tayo.popoola@myfloridalegal.com and capapp@myfloridalegal.com); and Kenneth Nunnelley, Assistant State Attorney (pcf@sao9.org and KNunnelley@sao9.org); and by U.S. mail to the Honorable Marc L. Lubet, Circuit Judge, 425 N. Orange Avenue, Chambers #1120, Orlando, FL 32801; on this 27th day of November, 2017.

Respectfully submitted,

/s/ Chelsea R. Shirley
Chelsea R. Shirley
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant CCRC - Middle Region
deliberato@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us
Counsel for Mr. Robinson

Appendix F

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 18-16

MICHAEL LEE ROBINSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

CHELSEA R. SHIRLEY
Assistant CCRC
Florida Bar No. 112901

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744
Capital Collateral Regional Counsel –
Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600
Counsel for Appellant

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Robinson's successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Robinson never waived his right to a penalty phase jury and was sentenced to death in violation of the Sixth and Eighth Amendments. The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), held that the Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 621. That did not happen in Robinson's case. The issues in this case are whether: (1) whether Robinson ever waived his right to a penalty phase jury, and if so, whether this Court will continue to deny defendants who did waive a penalty phase jury *Hurst* relief; and (2) whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Robinson *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral

review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Robinson because he never waived his right to a penalty phase jury. Denying Robinson *Hurst* relief because he allegedly waived his right to a penalty phase jury and/or because his sentence became final in 1999, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Robinson is also entitled to *Hurst* retroactivity as a matter of federal law.

CITATIONS

Citations shall be as follows: The record on appeal from Robinson's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. The record on appeal from Robinson's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

QUESTION PRESENTED BY THE COURT

In its Order dated Friday, February 23, 2018, this Court directed the parties to file briefs to specifically address why the Court should not affirm the lower court's order in light of *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In this brief, Robinson will first address the Court's question. *See* Argument I, *infra*. Then, Robinson will preserve for appellate review his arguments regarding the retroactive applicability of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to his sentencing. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see* Argument II, *infra*. Due to the truncated nature of the briefing, all claims not specifically argued from Robinson's successive motion are not waived and expressly incorporated herein.

REQUEST FOR ORAL ARGUMENT

A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Robinson respectfully requests that this Honorable Court permit oral argument.

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STATEMENT OF THE CASE

I. Trial Court Proceedings

On January 23, 1995, Robinson pled guilty to first-degree murder and waived a penalty phase jury. (TR1 4:255). The trial court imposed a sentence of death on April 12, 1995. (TR1 1:35; 3:107). Robinson asked for the death penalty and requested that no mitigating factors be considered by the trial court. (TR1 1:25). On appeal, this Court vacated his sentence and remanded the case because "the trial court failed to consider and weigh evidence of substantial mitigation found in the record." *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). This substantial mitigating evidence included: Robinson's two psychiatric and clinical evaluations; his history of various psychological "disturbances"; a "lifelong history of apparent mental health problems"; and Robinson's mental functioning which may have been impaired due to several brain injuries. *Id.* at 179-80.

In its opinion, this Court remanded the case "to the trial court to conduct a new penalty phase hearing before the judge alone." *Id.* at 180. This Court did not remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), which would not have granted Robinson the same rights as do plenary sentencing proceedings. Rather, this Court remanded for a new, plenary penalty phase hearing.

II. Second Penalty Phase Proceedings

Upon remand, Robinson attempted to withdraw his guilty plea, but trial counsel's

oral motion to withdraw the plea was denied. (TR2 2:17-18). The State argued at the new penalty phase that it did not have to again prove any aggravation because this was merely an opportunity for the defense to put on mitigating evidence and for the trial court to reweigh all of the aggravation and mitigation. (TR2 18-19, 24). In opposition, trial counsel argued that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase "is not a rubber stamping, [that] this is a new hearing." (TR2 2:20-21, 25). Prior to the start of the new penalty phase, there was no plea colloquy or any questioning of Robinson regarding whether or not he still wished to waive a penalty phase jury. The trial court sentenced Robinson to death, without the benefit of a jury, in violation of his Sixth Amendment right, on August 15, 1997. (TR2 3:260).

On direct appeal, Robinson challenged the trial court's denial of his counsel's oral motion to withdraw his guilty plea. *Robinson v. State*, 761 So. 2d 269, 273-74 (Fla. 1999). This Court denied his appeal and affirmed his conviction and sentence. *Id.* at 274-75, 279. The Supreme Court of the United States denied certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057 (2000).

III. Postconviction Proceedings

On February 21, 2001, Robinson filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. (PC 1:104-136). Robinson filed his final amended Rule 3.850 motion on October 10, 2001. (PC 1-2:192-259). Without

the benefit of *Ring* or *Hurst*, Robinson challenged Florida's capital sentencing scheme based on similar principles enunciated in those cases. (PC 2:233-38). He also argued that he did not "voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury, and the trial court's inquiry on the purported waiver was constitutionally inadequate." (PC 2:239).

An evidentiary hearing was conducted on January 29-30, 2003. (PC Supplemental 1:1-178). A final order denying relief was issued on May 15, 2003. (PC 3:540-60).

On appeal in his state habeas petition, Robinson argued: (1) this Court's decision on direct appeal precluding him from seeking a penalty phase jury was error, and appellate counsel unreasonably failed to bring this matter to the court's attention, thereby rendering ineffective assistance of counsel; and (2) Florida's capital sentencing statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Petition for Writ of Habeas Corpus Case No. SC04-772. This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Robinson v. State*, 913 So. 2d 514 (Fla. 2005).

On September 18, 2017, Robinson filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R 121-46). The State filed a response on October 9, 2017. (R 164-87). A case management conference was held on October 27, 2017. (R 266-94). The lower court denied Robinson's motion on November 8,

2017. (R 209-14). Robinson filed at timely motion for rehearing on November 27, 2017, which was denied on November 30, 2017. (R 224-27). This appeal follows.

STANDARD OF REVIEW

The standard of review is *de novo*. *See Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). The lower court's rulings are reviewed *de novo* and deference is given to factual findings supported by competent and substantial evidence. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENTS

ARGUMENT I: Robinson never waived his right to a penalty phase jury after this Court remanded his case for a new penalty phase. Second, even if Robinson did validly waive a penalty phase jury, despite this Court's precedent in *Mullens*, Robinson could not waive a right that was unconstitutionally withheld from him. On its face, such a waiver could never be knowing, voluntary and intelligent. Robinson submits that he is entitled to *Hurst* review and relief.

ARGUMENT II: Despite this Court's precedent in *Asay*, Robinson continues to argue that he is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*. To deny Robinson *Hurst* review is a violation of his Sixth, Eighth, and Fourteenth Amendments rights, a violation of his equal protection rights, and a fundamentally unfair and arbitrary application by this Court.

ARGUMENT I: Robinson never waived his right to a penalty phase jury, and even if he did so, he could not validly waive a right that was unconstitutionally withheld from him.

A. Robinson never waived his right to a penalty phase jury during his second penalty phase.

When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of the right. The individual must be fully informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Robinson's colloquy during his first trial. Nor did Robinson ever knowingly, voluntarily and intelligently waive his right to a penalty phase jury after this Court remanded his case for a new penalty phase.

During Robinson's first trial, the trial court conducted a limited colloquy as to Robinson's guilty plea but never conducted a colloquy as to his waiving a penalty phase jury. (TR1 1:5-36, 41-42). The only questioning regarding Robinson waiving his right to a penalty phase jury by the trial court was as follows:

Court:	Are the defense and the state waiving any jury for the penalty phase?
Mr. Culhan:	The Florida Supreme Court has recently said the State has nothing to say about that.
Court:	Then the defense?
Mr. Irwin:	We would be waiving the jury for the penalty phase, judge.
Court:	Have you talked to him about that?
Mr. Irwin:	Yes, we have.
Defendant:	I have stated that earlier.
Court:	You don't want a jury for the penalty phase?
Defendant:	I don't feel I need it. I think if you – contingent on - can

you return a penalty phase of death by that?

Court: I've done it before.

Defendant: That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.

Court: To recommend a sentence?

Defendant: That is correct.

*****

Court: Mr. Robinson has already pled to first degree murder and I understand he did not want to have a jury for the recommendation. Is that still the case?

Mr. Irwin: That's correct, your honor.

Court: Mr. Robinson, is that true? You don't want a jury?

Defendant: Yes, ma'am, that's correct.

Court: And have you talked to your lawyers about that again and you still think that that's the way you want to go, without a jury?

Defendant: Yes, ma'am. They came to the jail yesterday and interviewed me and we discussed it and that's correct, I still wish to go without a jury.

(TR1 1:32-33, 41-42).

Unlike in *Mullens*, it cannot be said that the above colloquy demonstrated that Robinson was "made aware of the dangers and disadvantages of [waiving a jury], so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835-36 (1975) (internal citations omitted). *See Mullens v. State*, 197 So. 3d 16, 39 (Fla. 2016), reh'g denied, cert. denied, 137 S. Ct. 672 (2017) ("The trial court conducted a thorough colloquy and asked Mullens if he understood the right that he was relinquishing and that he was subject to sentences of either death or life imprisonment."). The trial court in *Mullens* warned Mullens no less than four times about the dangers of waiving a penalty phase jury and its sentencing recommendation. *See Mullens v. State*, SC13-1824, ROA

15:2261-64. After the fourth warning, Mullens stated, "Sir, it seem[s] like you keep asking the same thing like I'm making the wrong decision or something." *Id.* at 2264. Robinson received no such admonition.

The importance of a thorough colloquy is especially evident now in our post-*Hurst* landscape. The meager questioning done by the trial court in Robinson's case composes less than four pages of the transcript and is not the unequivocal waiver of a right after having been informed as to all of the dangers and disadvantages of waiving that right.

Second, after the Florida Supreme Court vacated and remanded Robinson's case for a new penalty phase, *he never waived his right to a penalty phase jury*, and neither trial counsel nor the trial court ever asked Robinson on the record whether he wanted a penalty phase jury. Robinson maintains that this Court, when it vacated his original death sentence, remanded his case for a new, plenary penalty phase proceeding rather than a mere reweighing of the aggravating and mitigating circumstances. Trial counsel argued at the second penalty phase that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase "is not a rubber stamping, [that] this is a *new hearing*." (TR2 2:20-21, 25) (emphasis added).

This Court has held that if there is judicial discretion as to what new sentence could be imposed, this eliminates the ministerial nature of the resentencing and makes it a completely new proceeding. *Jordan v. State*, 143 So. 3d 335, 339-40 (Fla. 2014). *See*

also Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997) (holding that a resentencing proceeding was a "completely new proceeding," and the trial court was therefore under no obligation to make the same findings as those made in Phillips' prior sentencing proceeding); and *Hartley v. State*, 175 So. 3d 757 (Fla. 2015) (a trial court's prior findings no longer stand, especially given that a trial court is not obligated to make the same findings on resentencing as at the original sentencing). The trial court in this case clearly had discretion over what new sentence to impose on Robinson and was under no obligation to impose the death penalty again. Further, the new penalty phase involved additional considerations and involved more sentencing discretion than the first penalty phase. This Court made clear on remand that the trial court must take into consideration the wealth of mitigating evidence in Robinson's case which it ignored the first time, and, during the second penalty phase, Robinson allowed his trial counsel to present a plethora of new mitigating evidence which was not previously presented. Thus, his new penalty phase was a completely new proceeding and the failure to empanel a penalty phase jury, or perform the required colloquy to see if Robinson still wanted to waive his right to a jury, was a violation of Robinson's Sixth Amendment rights.

Robinson had the right to decide anew whether or not he wished to have a penalty phase jury and/or to knowingly, voluntarily, and intelligently waive that right. Robinson was given no such choice, despite the fact that, as this Court noted in the

appeal from the resentencing, Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 so. 2d 269, 275 n.5 (Fla. 1999).

Robinson preserved this argument and challenged his denial of a penalty phase jury in his initial Motion to Vacate Judgment and Sentence in Claim XI. (PC 2:239). The circuit court denied this claim finding that it was procedurally barred because it was raised on direct appeal and ruled upon by the Florida Supreme Court. (PC 3:554). That holding is incorrect. Robinson only challenged the denial of his motion to withdraw his *guilty plea* on direct appeal – Robinson did not challenge the lack of a penalty phase jury. *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999). To date this Court never ruled on whether or not his waiver of a *penalty phase jury*, on remand, was valid – or if he ever waived one at all. Robinson also raised this issue in his state habeas petition.

Should this Court determine that the trial court was bound by this Court's wording that the new penalty phase hearing be before "the judge alone," *Robinson*, 684 So. 2d at 180, this Court violated Robinson's Sixth Amendment right to a jury, and this violation cannot now be used to preclude *Hurst* relief under *Mullens*. The Court's opinion remanding the case should not have placed any restrictions on Robinson's ability, at the resentencing, to invoke his right, or waive his right, to a jury at resentencing. The right to have his resentencing proceeding conducted before a jury and not a judge, is one of the most fundamental rights afforded a criminal defendant

under the Sixth Amendment. *See e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002). "The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id.* As the Supreme Court emphasized in *Sullivan v. Louisiana*, the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." 508 U.S. 275, 277 (1993) (citation omitted).

Because Robinson never waived his right to a penalty jury and since it was this Court's unconstitutional pre-*Hurst* decision on appeal that unduly restricted Robinson's ability to seek a jury determination at the penalty phase, he is excluded from the class of defendants not eligible for *Hurst* relief that this Court created in *Mullens*.

B. Robinson could not constitutionally waive a right that was not afforded to him.

Even if Robinson did validly waive his right to a penalty phase jury at his original sentencing, that waiver cannot now be used to deny him *Hurst* relief. A defendant cannot waive a right that was not yet recognized by the courts. *See Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v.*

Access Therapies, Inc., No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have."); *Cruz v. Lowe's Home Centers, Inc.*, No. 8:009-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established"). At the time of Robinson's sentencing, Florida's unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a sentence of death. Therefore, Robinson could never waive his right to a jury fact-finding and a requirement of a unanimous jury sentencing. *See Halbert*, 545 U.S. at 623; *Hurst v. Florida*, 136 S. Ct. 616; *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'"). *See also Hurst v. State*, 202 So.3d at 62, n. 18. Robinson could not constitutionally waive a right that was not afforded to him.[1]

Should this Court determine that a defendant could waive his jury sentencing, even though the right did not exist, then this Court must inquire into the waiver colloquy.

[1] This was made clear in the brief colloquy conducted by the trial court, where it asked Robinson if he wanted to waive the jury's "recommendation."

See Mullens, 197 So. 3d at 39; *see also Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010); *Rodgers v. Jones*, 3:15-cv-507-RH, ECF No.15 (N.D. Fla. Aug. 24, 2016). The Sixth Amendment provides that a defendant has a fundamental right to a jury trial. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). However, fundamental constitutional rights can be waived when a defendant so chooses. *See Boykin v. Alabama*, 395 U.S. 238 (1969). Nonetheless, an effective waiver of a constitutional right must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742 (1970). Further, the constitutionality or appropriateness of a waiver of a constitutional right, such as Robinson's Sixth, Fifth, and Fourteenth Amendment rights, must be unequivocal. The Supreme Court of the United States in *Faretta v. California*, 422 U.S. 806 (1975) demonstrated the detailed inquiry that is necessary to determine whether a criminal defendant has unequivocally waived his right to counsel. Specifically, our highest Court held:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242. Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively

> shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure.

Faretta, 422 U.S. at 835-36 (internal footnote omitted). It should be noted just how detailed the colloquy was by the Court in *Faretta* to make sure that the defendant was not only aware of his rights, but also the court articulated the dangers of waiving his right. *See Pasha v. State*, 39 So. 3d 1259, 1261 (Fla. 2010) (quoting *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008) ("It is clear that '[b]efore the trial court can make a decision whether to permit the defendant to proceed *pro se*, the defendant's request for self-representation must be unequivocal.'"). The importance of an appropriate and detailed colloquy cannot be understated when assessing whether a waiver of a constitutional right is valid. The Supreme Court of Florida clearly rejected an attorney's written waiver on behalf of his client waiving his right to a jury trial because the record did not demonstrate that the waiver was knowing, voluntary, and intelligent. *See State v. Upton*, 658 So. 2d 86 (Fla. 1995). The Court held that:

> [i]n the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly, voluntarily and intelligently waived his right to a trial by jury. We reject the State's alternative contention that the case should be remanded for an evidentiary hearing to determine whether Upton agreed with his attorney's waiver of a

jury trial. *See Williams*, 440 So.2d at 1291.

Upton, 658 So. 2d at 88, *approved sub nom. Johnson v. State*, 994 So. 2d 960, 963 (Fla. 2008) ("an oral waiver, which is preceded by a proper colloquy during which the trial judge focuses on the value of a jury trial and provides a full explanation of the consequences of a waiver, *see Tucker v. State*, 559 So.2d 218, 220 (Fla. 1990), is necessary to constitute a sufficient waiver. Further, a defendant's silence does not establish a valid waiver of the right to a jury trial."). Robinson's colloquy cannot be seen as an unequivocal waiver of his jury sentencing rights because he was not advised of any of the pros or cons of his decisions. He was simply told that he is waiving the right to a jury recommendation. When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of those rights, having been informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Robinson's colloquy that would satisfy denying him *Hurst* review. In its order, the lower court denied relief pursuant to this Court's ruling in *Mosley v. State*, 210 So. 3d 1248, 1274 (Fla. 2016) citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and this Court's ruling in *Mullens*. (R 211-12). With regard to the denial of relief based on *Mullens*, the lower court stated as follows:

> Finally, the Florida Supreme Court has specifically held – in cases to which *Hurst* otherwise applies – that a defendant who waives a penalty phase jury is not entitled to relief under *Hurst* because he "cannot subvert the right to jury fact-finding by waiving that right and then suggesting that a subsequent

> development in the law has fundamentally undermined his sentence." *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016).

(R 212). While Robinson acknowledges this Court's decision in *Mullens*, it is Robinson's position that this Court's decision has created an arbitrary class of defendants that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required by the Supreme Court of the United States in *Ring* and *Hurst*, simply because the defendant waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. This Court held that *Mullens* could not "avail himself of relief" pursuant to *Hurst v. Florida* because he waived an advisory jury recommendation for penalty phase and elected to be sentenced by the judge. *See Mullens*, 197 So. 3d at 38-40. The court cited *Blakely v. Washington*, 542 U.S. 296, 310 (2004), and concluded, "[N]othing prevents a defendant from waiving his *Apprendi* rights...If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." 197 So. 3d at 38. Certainly, no waiver can ever be appropriate or valid in these cases. Especially, when the right being waived provided less protection than it does now, *i.e.* a minor-majority jury recommendation versus a unanimous jury fact-finding and ultimate decision-making.

The lower court never made specific findings regarding the thoroughness of the

colloquy concerning the waiver of jury sentencing. The court only made findings regarding Robinson's guilty plea. (TR1 1:35). The trial court's sentencing order simply stated:

> [t]he Defendant waived a jury for an advisory sentence at the penalty phase of the proceedings and he waived presentation of any mitigators...The Defendant at every appearance appeared rational, competent, well spoke, well groomed, and focused on his objective of being sentenced to die...

(TR1 4:255-56). There was no finding that Robinson voluntarily, knowingly, and intelligently waived his right to a jury, let alone one supported by competent and substantial evidence. Robinson's jury waiver was an unreasonable finding of the facts. *See Brady v. United States*, 397 U.S. 742 (1970) (holding that an effective waiver of a constitutional right must be voluntary, knowing, and intelligent). It is clear from the colloquy that Robinson's waiver was not appropriate or constitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (TR1 1:32-33, 41-42).

The questioning of Robinson by the trial court regarding his rights was extremely truncated and inadequate. The brief questioning of Robinson by the trial court regarding his rights was focused solely on the guilty plea. (TR1 1:7, 11) (Court asking, "Do you know that the only options you have if you're convicted of first-degree murder, that you would be, if you plead, that you would only have the option of death or life in prison?"). The only questioning regarding any penalty phase rights at all was done by trial counsel and solely focused on what mitigating evidence could be presented during the penalty phase. (TR1 1:23-24). Neither trial counsel nor the trial

court touched on the rights Robinson was waiving by giving up a penalty phase jury.

The primary focus of the plea colloquy by the trial court and trial counsel was the waiver of rights associated with the guilt/innocence phase and the rights that accompany a jury trial. The trial court made no reference during the colloquy as to the rights Robinson was forfeiting by waiving a penalty phase jury. Trial counsel did make a passing reference to the aggravating and mitigating evidence which could be presented. However, there is no questioning specifically aimed at the penalty phase proceedings or the bare majority recommendation. This colloquy cannot be considered appropriate or unequivocal, and the trial court's fact-finding – or lack thereof – as to the penalty phase was reversed on appeal by this Court. *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). At the new penalty phase, no colloquy occurred at all regarding Robinson's right to a penalty phase jury, even though Robinson no longer wished to die and he allowed his attorneys to present new mitigating evidence.

Moreover, Robinson's colloquy immensely pales in comparison to Mullens' colloquy that consisted of "persistent questions" and a "thorough colloquy." *Mullens*, 197 So. 3d at 39 (Mullens remarked to the trial court that "it seem[s] like [the court] keep[s] asking the same thing like [he] is making the wrong decision or something." Mullens said he was "absolutely positive" as to his waiver). There were no questions by the trial court to Robinson regarding the specific rights that are abandoned by the waiver of jury sentencing at a penalty phase like those detailed in *Mullens* by this

Court in support of its denial. *See Id.*

Notwithstanding the insufficient colloquy, Robinson cannot waive a constitutional right that should have been afforded to him and every capital defendant, if the constitutional right did not exist at the time. The fact that Robinson's trial counsel stated that he believed that Robinson understood the possible consequences of his plea is not relevant as he advised him under the belief of an unconstitutional sentencing law. (TR1 1:7). *See Hurst v. Florida*, 136 S. Ct. 616; *see Ring v. Arizona*, 536 U.S. 884 (2002). Now that a unanimous jury is needed to sentence a defendant to death, the conversations and assessments between counsel and criminal defendants dramatically changes. Moreover, the colloquy by a court in cases of waivers will also dramatically change. *Hurst* will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; the jury will make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis, the landscape of voir dire and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments. As this Court explained in *Hurst v. State*, all of the

findings necessary for the imposition of a death sentence must be unanimously found by the jury:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

202 So. 3d at 57-58; *See also, Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (remanding for a resentencing based on *Hurst v. State* where, although the jury was provided with an interrogatory verdict form, it did not unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances). Robinson never had the constitutional benefit of the option of a penalty phase jury to return a verdict making findings of fact. So we have no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they carried the immense and final responsibility for whether a death

sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all considerations for a conversation regarding a waiver and/or a colloquy. Reviewing courts cannot speculate as to what the findings or vote would be in a case where Robinson would be allowed a jury sentencing where twelve jurors have to make a binding decision.

Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join in a death recommendation at resentencing.

When this Court compares Mullens' colloquy to Robinson's, there is no comparison. The lower court erred in its findings and must be reversed. Robinson did not have an appropriate and unequivocal waiver of his jury sentencing during his first penalty phase and never waived his right to a jury during his second penalty phase. Robinson was predominantly questioned about the waiver of his guilt/innocence phase and the effect of a plea of guilt. Regardless, Robinson never waived his right to a jury at his new penalty phase after this Court vacated his death sentence, and his prior waiver should not have been binding at his new penalty phase proceeding. All of Robinson's rights were available anew and it was error to treat his waiver as binding in a completely new proceeding.

Moreover, Robinson's case represents why it is dangerous for this Court to create a blanket denial of *Hurst* review for waiver of jury sentencing cases. This Court must look at each case. Now, under *Hurst*, Robinson would get a life sentence if one juror voted for life versus the unconstitutional bare majority recommendation. Robinson's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, and *Hurst v. Florida*. The *Hurst* error in Robinson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Robinson's death sentence must be vacated and a resentencing ordered.

Argument II: This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Robinson.

This Court permitted all parties to include a brief statement to preserve arguments as to the merits of this Court's previously decided cases, as deemed necessary. Robinson will briefly address the additional arguments that were raised below and requests that this Court rely on his pleadings and arguments below in support of his request for *Hurst* review and relief. (R 121-46, 218-23).

The lower court, pursuant to this Court's precedence in *Asay* and *Mosley*, denied Robinson retroactive application of *Hurst*. (R 210-12). *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval

in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.[2] Retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925. Partial retroactivity can never ensure fairness and uniformity in individual adjudications and would amount to arbitrary application of the death penalty. *See Asay*, 210 So. 3d at 37-41 (Perry, J. dissenting "The grave injustice of assigning whether a person lives or dies on a date in time, when it is clear that they were illegally sentenced is irreversible."); *see Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Robinson's death sentence

[2] Robinson recognizes that *Asay v. State*, 210 So. 3d 1 (Fla. 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst*. However, Robinson's case should be decided on an individual basis. To deny him the retroactive effect of *Hurst*, while granting it to similarly situated capital defendants, deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

was imposed without a unanimous jury verdict for death and without a valid waiver of that right. This Court held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less results in an unreliable sentence which violates the Eighth Amendment.

Moreover, society's evolving standards of decency demand that Robinson be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to now unanimous. Also, as a matter of due process and equal protection of laws under the Fourteenth Amendment, all death sentences under Florida's unconstitutional sentencing scheme must be entitled to retroactive application of *Hurst. See* U.S. Const. amend. XIV. It can never be repeated enough that "Death is Different" and is permanent. Robinson must be granted retroactive relief of *Hurst v. Florida*. Robinson continues to preserve his arguments in his successive motion proceedings and his motion for rehearing for further appellate review.

Lastly, both *Hurst* decisions announced substantive rules that must be applied retroactively to Robinson by this Court under the Supremacy Clause. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the U.S. Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive"

constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State* – one under the Sixth Amendment and one under the Eighth Amendment.

In the *Hurst* context, the Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch v. U.S.*, 136 S. Ct. 1257, 1265 (2016), with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And, in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60, *i.e.*, the new law by necessity places certain individuals beyond the state's power to impose a death sentence.

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the U.S. Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V.*

v. City of New York, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). Because this Court is bound by the federal constitution, it has the obligation to address Robinson's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816).

In light of fundamental fairness[3], due process, equal protection, and the evolving standards of decency, partial retroactivity that sets a point in time as to whether a person lives or dies can never be constitutional. Robinson submits to this Court that in accordance with his Sixth, Eighth, and Fourteenth Amendment rights, he should receive retroactive application of *Hurst*. The *Hurst* error in Robinson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Robinson's death sentence must be vacated and a resentencing ordered.

CONCLUSION

Robinson requests that this Court reverse the lower court's rulings, vacate his sentence, and grant him a new penalty phase.

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[3] Like in *Mosley*, Robinson preserved a Sixth Amendment challenge and should be entitled to the retroactive effect of *Hurst* under *James v. State*, 615 So. 2d 668 (Fla. 1993).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Doris Meacham, Doris.Meacham@myfloridalegal.com & cappapp@myfloridalegal.com; on this 15th day of March, 2018.

Respectfully submitted,

/s/ Chelsea R. Shirley
Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
Phone: 813-558-1600
Shirley@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
deliberato@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway

Temple Terrace, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us

Counsel for Robinson

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

/s/ Chelsea R. Shirley
Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
Phone: 813-558-1600
Shirley@ccmr.state.fl.us

Appendix G

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 18-16

MICHAEL LEE ROBINSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF APPELLANT

CHELSEA R. SHIRLEY
Assistant CCRC
Florida Bar No. 112901

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744
Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600
Counsel for Appellant

PRELIMINARY STATEMENT

The Appellant, Michael Lee Robinson ("Robinson") relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following reply to the Reply Brief of Appellee dated March 22, 2018. While Robinson will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues not specifically replied to herein.

Page references to the record on appeal from Robinson's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. The record on appeal from Robinson's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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ARGUMENT I: Robinson's claims are not procedurally barred and he never waived his right to a penalty phase jury.

A. Robinson is not procedurally barred from obtaining review of his non-waiver of a penalty phase jury.

Robinson has consistently asserted that he never waived his right to a penalty phase jury. Thus, contrary to the State's assertions, he is not procedurally barred from obtaining relief.

This Court has not hesitated, in the past, to apply fundamental fairness to defendants who have properly preserved challenges before there were decisions enshrining those challenges as law. In fact, when this Court has declined to apply the rule of fundamental fairness as expounded in *James v. State,* 615 So.2d 668 (Fla. 1993), it has been as a result of failures to preserve the issue for appeal. *See Glock v. Moore*, 776 So.2d 243, 254-55 (Fla. 2001) ("In *James*, however, the defendant properly raised the issue in the trial court and again on appeal. Glock, on the other hand, failed to raise the issue on appeal."). Applying fundamental fairness and retroactive effect to a defendant who has preserved the issue does not unnecessarily open the flood gates, but only grants relief to those, like Robinson, who have specifically preserved the issue. To do otherwise would not only engender an unfair and random result, but would be a violation of due process rights under the Fourteenth Amendment and the corresponding provisions of the Florida Constitution. "Due process requires that fundamental fairness be observed in each case for each defendant." *Gore v. State*, 719 So.2d 1197, 1203 (Fla. 1998).

Further, it undercuts the importance of preservation of issues. "Preservation of the issue is perhaps the most basic tenet of appellate review, *see Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for capital defendants." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in result). "This preservation approach – enshrined in *James* – ameliorates some of the majority's concern with the effect on the administration of justice." *Id.*

Robinson raised Sixth Amendment challenges to his lack of a jury waiver, and this Court's unconstitutional remanding of his new penalty phase before the judge alone. He raised these issues in his postconviction motion and his state petition for habeas corpus. Robinson has consistently challenged this Court's denial of his Sixth Amendment right to a jury. In this case, the interests of finality must yield to fundamental fairness. It would be fundamentally unfair, and error, to ignore the Sixth Amendment infirmities in Robinson's case.

The Appellee relies on this Court's prior decision remanding Robinson's case for a new penalty phase "before the judge alone," *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1996), to find that Robinson is entitled to no relief. Reply Brief at 6. However, now, in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), we know that this Court's prior decision was error. This Court's opinion remanding Robinson's case should not have placed any restrictions on Robinson's ability, at his new penalty phase, to invoke his right, or waive his right, to a penalty phase jury. The right to have his new penalty phase proceeding

conducted before a jury and not a judge, is one of the most fundamental rights afforded a criminal defendant under the Sixth Amendment. *See e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002). "The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id.* As the Supreme Court emphasized in *Sullivan v. Louisiana*, the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." 508 U.S. 275, 277 (1993) (citation omitted). This Court violated that right when it remanded Robinson's case "before the judge alone" and that violation cannot now be used to preclude him from relief.

B. Robinson did not knowingly, intelligently, or voluntarily waive his right to a penalty phase jury.

First, the Appellee is patently incorrect in asserting that Robinson ever made a valid *Durocher*[1] waiver. State's Reply Brief at 4, 6, 8, and 10. At no point has Robinson ever asserted that he wished to waive his right to postconviction proceedings. In fact,

[1] *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) (establishing that a defendant is entitled to waive postconviction proceedings so long as there is an inquiry conforming to *Faretta v. California*, 422 U.S. 806 (1975), into the "knowing, intelligent, and voluntary" nature of the waiver).

Robinson has asserted that right through filing a state postconviction motion, a state petition for habeas corpus, and through the federal court system. Nor was a *Durocher* proceeding ever initiated by the lower court. Since Robinson never made a valid *Durocher* waiver, this Court should disregard the entirety of Appellee's Argument I(B).

Appellee also argues that Robinson is not entitled to relief under *Hurst* because *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016) is controlling precedent. Appellee interprets its holding as "the defendant was entitled to no relief because he waived the penalty phase jury." Reply Brief at 7. However, that is an incomplete interpretation of *Mullens*, which also holds that, "a waiver of the right to jury sentencing will be upheld if that waiver is knowingly, voluntarily, and intelligently made" and that Mullens "*validly waived* that right." *Id.* at 39, 40 (emphasis in original). The Appellee also mentions that *Mullens* quotes *Blakely v. Washington*, 542 U.S. 296, 310 (2004), but fails to include the portion of the quote that states, "If *appropriate* waivers are procured, States may continue to offer judicial factfinding." *Id.* at 38. Accordingly, as Robinson explained in his Initial Brief, this case is distinguishable from *Mullens* because, unlike Mullens, who validly waived his right to a penalty phase jury, Robinson never waived his right to a penalty phase jury during his second penalty phase.

The Appellee cites to multiple opinions where this Court has denied *Hurst* relief to a capital defendant who waived a penalty phase jury. Reply Brief at 7. However, all of the cases listed on page seven of the Reply Brief can be distinguished from Robinson's case

because all of those opinions cite *Mullens* as the precedent for denying relief. Again, Mullens was denied *Hurst* relief because his penalty phase jury waiver was valid. *Mullens*, 197 So. 3d at 40; *see, e.g.*, *Wright v. State*, 213 So. 3d 881, 903 (Fla. 2016) (citing *Mullens* and declining to grant *Hurst* relief where the defendant had knowingly, voluntarily, and intelligently waived a penalty-phase jury). Nor is this Court's recent *Silvia* decision persuasive because, as noted by this Court, "Silvia does not dispute in this case the validity of his original waiver." *State v. Silvia*, -- So. 3d – 2018 WL 654715 *1 (Fla. Feb. 1, 2018). The circumstances of Robinson's case show that his waiver was invalid; therefore, none of the opinions denying *Hurst* relief on the basis of the holding in *Mullens* or *Silvia* are applicable to his case.

The Appellee's argument that Robinson "was thoroughly informed in much the same manner as Mullins [sic]" is irrelevant as the trial court's warnings only related to *guilt phase* rights – and only applies to Robinson's first penalty phase. Reply Brief at 8-9. The quotes provided by the Appellee only demonstrate the inquiry covered as to the *guilt phase* rights Robinson was giving up by pleading guilty – at no point does the Appellee cite anything to even suggest that Robinson was fully informed of the *penalty phase* rights he was relinquishing. Further, no colloquy was ever performed during Robinson's second penalty phase.

The Appellee further argues that a waiver remains valid regardless of later developments in the law. Reply Brief at 9. For this assertion, the Appellee is making the

same presumption as the lower court by assuming that Robinson's waiver was valid without further analysis. In addition, the cases cited by the Appellee solely relate to guilty pleas, which are distinguishable from waiving the right to a penalty phase jury because there is not a "high likelihood that defendants, advised by competent counsel, would falsely condemn themselves." *See Brady v. United States*, 397 U.S. 742, 758 (1970). Instead, what is at issue here is whether Robinson still wanted the death penalty or whether Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 so. 2d 269, 275 n.5 (Fla. 1999). The record is abundantly clear that Robinson never waived his right to a penalty phase jury during his second penalty phase, and he also allowed his trial counsel to present mitigating evidence and argue for a life sentence. The Supreme Court's concern about false guilty pleas is not at issue here, making *Brady* irrelevant to this Court's analysis of the issues.

Notably, the requirement that a valid plea must be knowing, intelligent, and voluntary still exists. *Brady*, 397 U.S. at 758 ("[O]ur view...is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions...."). Robinson has shown that he did not waive a second penalty phase jury and that his initial waiver was not knowing, intelligent, and voluntary. Therefore, Robinson's initial waiver is invalid, and he was not, and is not, bound by that waiver now.

Second, *McMann v. Richardson* explains that "[w]hether or not the advice the defendant received in the pre-*Jackson*[2] era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime." 397 U.S. 759, 773 (1970). There the Court was concerned with invalidating all New York guilty pleas motivated by confessions. *Id.* at 774. No such floodgates will swing open if Robinson is granted the benefits of *Hurst.*

Robinson has shown that his waiver was not knowing, intelligent, and voluntary. Therefore, Robinson's initial waiver is invalid and he was not and is not bound by that waiver now – especially since he never waived his right to a penalty phase jury at his new penalty phase. Therefore, Robinson's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, and *Hurst v. Florida.* The *Hurst* error in Robinson's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Robinson's death sentence must be vacated and a resentencing ordered.

Argument II: Robinson's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Appellee's arguments against federal retroactivity are likewise not persuasive. *Hurst*

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[2] *Jackson v. Denno*, 378 U.S. 368 (1964).

retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the U.S. Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed based on a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Second, this argument does not address the equal protection concerns which flow from this Court holding *Hurst* partially retroactive. Until *Asay*, retroactivity has always been a binary decision – either a case is retroactive or it is not. In keeping with that precedent, in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court adopted the retroactivity analysis set forth in *Stoval v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965). The binary nature of the *Stoval/Linkletter* analysis is clear on the face of those opinions. *Stoval*, 388 U.S. at 294 ("This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the

exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively."); *Linkletter*, 381 U.S. at 622 ("we are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion."). *See Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) ("*the retroactivity or nonretroactivity* of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.") (emphasis added); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 409 (1966) ("The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the problem of whether a judicial decision that overturns previously established law is to be given *retroactive or only prospective application.*") (emphasis added).

This Court, by the separate results in *Asay* and *Mosley*, made *Hurst v. Florida* partially retroactive, without either decision deciding that partial retroactivity was permissible under *Witt v. State* or the *Stoval/Linkletter* analysis *Witt* was derived from. None of the parties to *Asay* and *Mosley*, advocated for partial retroactivity. No party argued that partial retroactivity was even a possible outcome since until *Asay* and *Mosley* case law had not recognized that partial retroactivity was even a possibility.

The ad hoc line drawing that resulted must of course be arbitrary, as ad hoc rulings are by definition, and do not comport with *Witt*. *See Asay*, 210 So. 3d at 31 (Lewis, J.,

concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002 - the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at 58. However, that is where the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay."); *Id.* at 33 (Pariente, J., concurring in part, dissenting in part) ("a faithful application of the *Witt* test for retroactivity compels full retroactivity of *Hurst*."); *Id.* at 37 (Perry, J., dissenting) ("I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a binary -- either something is retroactive, has effect on the past, or it is not."); *Mosley*, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) ("Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision."). This arbitrary line drawing cannot comport with the Fourteenth Amendment.

CONCLUSION

Robinson requests that this Court reverse the lower court's rulings, vacate his sentence, and grant him a new penalty phase.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Doris Meacham, Doris.Meacham@myfloridalegal.com & cappapp@myfloridalegal.com; on this 27th day of March, 2018.

Respectfully submitted,

/s/ Chelsea R. Shirley
Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
Phone: 813-558-1600
Shirley@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
deliberato@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway

Temple Terrace, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us

Counsel for Robinson

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

/s/ Chelsea R. Shirley
Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
Phone: 813-558-1600
Shirley@ccmr.state.fl.us