

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

RAHEELA AHMED

COUNSEL OF RECORD

FLORIDA BAR No. 0713457

AHMED@CCMR.STATE.FL.US

MARIA CHRISTINE PERINETTI

FLORIDA BAR No. 0013837

PERINETTI@CCMR.STATE.FL.US

LISA MARIE BORT

FLORIDA BAR No. 0119074

BORT@CCMR.STATE.FL.US

ASSISTANT CCRCs

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY,
TEMPLE TERRACE, FLORIDA 33637-0907
(813) 558-1600

*Counsel for the Petitioner, Dominick A.
Occhicone.*

CAPITAL CASE

QUESTION PRESENTED

Whether the Florida Supreme Court violated the Supremacy Clause and the Sixth, Eighth, and Fourteenth Amendments to the United States Consitution in affirming Dominick A. Occhicone's judicially-determined death sentence and in denying him an equal right to *Hurst v. Florida* review simply because his sentence became final before June 24, 2002?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

CONTENTS	PAGE(S)
QUESTION PRESENTED	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	4
Trial Court Proceedings	4
REASONS FOR GRANTING THE WRIT.....	9
I. By Denying Mr. Occhicone the Benefit of the <i>Hurst</i> Decision, the Florida Supreme Court Violated the Sixth, Eighth and Fourteenth Amendments of the United States Constitution	9
II. The <i>Hurst</i> Decisions Announced Substantive Constitutional Rules and the Supremacy Clause of the United States Constitution Requires State Courts to Apply Those Rules Retroactively to All Cases on Collateral Review	17
CONCLUSION.....	24

TABLE OF CONTENTS

INDEX TO APPENDICES [IN SEPARATE VOLUME]

Appendix A.	Order of the Supreme Court of Florida affirming the lower court's denial of <i>Hurst</i> relief. <i>Occhicone v. State</i> , Appeal No. SC17-1112 (January 30, 2018).
Appendix B.	Order of the Supreme Court of Florida directing the Appellant to show cause as to why the trial court's order denying <i>Hurst</i> relief should not be affirmed in light of <i>Hitchcock v. State</i> . <i>Occhicone v. State</i> , Appeal No. SC17-1112 (September 25, 2017).
Appendix C.	Order of the Supreme Court of Florida staying the appeal pending the disposition of <i>Hitchcock v. State</i> . <i>Occhicone v. State</i> , Appeal No. SC17-1112 (June 14, 2017).
Appendix D.	Final Order of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, dismissing Mr. Occhicone's successive motion to vacate death sentence. Circuit Court Case No. CRC86-01355CFAWS (May 18, 2017).
Appendix E.	Order of the Supreme Court of Florida affirming the lower court's denial of Mr. Occhicone's initial postconviction motion. <i>Occhicone v. State</i> , Appeal No. SC93343 (June 29, 2000).
Appendix F.	Order of the Supreme Court of Florida affirming Mr. Occhicone's judgment and sentence. <i>Occhicone v. State</i> , Appeal No. 71505 (October 11, 1990).
Appendix G.	Sentencing order of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida. Circuit Court Case No. CRC86-01355CFAWS (November 18, 1987).
Appendix H.	Mr. Occhicone's motion to declare section 921.141 Florida Statutes (1985), unconstitutional. Circuit Court Case No. CRC86-01355CFAWS (April 30, 1987).
Appendix I.	Mr. Occhicone's motion to declare that death is not a possible penalty. Circuit Court Case No. CRC86-01355CFAWS (April 30, 1987).
Appendix J.	Order of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, denying Mr. Occhicone's motion to declare section 921.141 Florida Statutes (1985), unconstitutional. Circuit Court Case No. CRC86-01355CFAWS (September 15, 1987).
Appendix K.	Order of the Circuit Court of the Sixth Judicial Circuit in and for Pasco

TABLE OF CONTENTS

INDEX TO APPENDICES - CONTINUED [IN SEPARATE VOLUME]

- Appendix K. Order of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, denying Mr. Occhicone's motion to declare that death is not a possible penalty. Circuit Court Case No. CRC86-01355CFAWS (September 15, 1987).
- Appendix L. Reprint of Florida Death Sentencing Scheme in 1987. FLA. STAT. § 921.141 (1987).

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Abdool v. State</i> , 220 So. 3d 1106 (Fla. 2017)	14
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	20
<i>Armstrong v. State</i> , 211 So. 3d 864 (Fla. 2017)	14
<i>Ault v. State</i> , 213 So. 3d 670 (Fla. 2017)	13
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	9
<i>Bottoson v. Florida</i> , 537 U.S. 1070 (2002)	11
<i>Bottoson v. Moore</i> , 833 So. 2d 693 (Fla. 2002)	7, 11
<i>Boyde v. California</i> , 494 U.S. 370 (1990)	21
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)	20
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	21
<i>Davis v. State</i> , 207 So. 3d 142 (Fla. 2016).....	20
<i>Deviney v. State</i> , 213 So. 3d 794 (Fla. 2017).....	13
<i>Durousseau v. State</i> , 218 So. 3d 405 (Fla. 2017)	13
<i>Franklin v. State</i> , 209 So. 3d 1241	14
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	10
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980).....	10
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	5
<i>Hildwin v. Florida</i> , 490 U.S. 638 (1989).....	11
<i>Hitchcock v. Florida</i> , 138 S. Ct. 513 (2017).....	7
<i>Hitchcock v. State</i> , 226 So. 3d 216 (Fla. 2017).....	7, 10
<i>Hodges v. State</i> , 213 So. 3d 863 (Fla. 2017).....	13

TABLE OF AUTHORITIES - CONTINUED

CASES	PAGE(S)
<i>Hojan v. State</i> , 212 So. 3d 982 (Fla. 2017).....	15
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	<i>passim</i>
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016).....	<i>passim</i>
<i>Ivan V. v. City of New York</i> , 407 U.S. 203 (1972)	20
<i>Jackson v. State</i> , 213 So. 3d 754 (Fla. 2017).....	11
<i>James v. State</i> , 615 F. 2d 668 (Fla. 1993).....	6
<i>Johnson v. State</i> , 205 So. 3d 1235 (Fla. 2016)	14
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008).....	10
<i>Knight v. Florida</i> , 528 U.S. 990 (1999).....	12
<i>Kopsho v. State</i> , 209 So. 3d 568 (Fla. 2017)	14
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965).....	6, 10
<i>McGirth v. State</i> , 209 So. 3d 1146 (Fla. 2017)	14
<i>McKoy v. North Carolina</i> , 494 U.S. 433 (1990)	21
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	17
<i>Mills v. Maryland</i> , 486 U.S. 367 (1988).....	21
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	17
<i>Mosley v. State</i> , 209 So. 3d 1248 (Fla. 2016)	7, 14
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	20
<i>Occhicone v. Florida</i> , 500 U.S. 938 (1991).....	5, 8
<i>Occhicone v. State</i> , 235 So. 3d 299 (Fla. 2018)	1

TABLE OF AUTHORITIES - CONTINUED

CASES	PAGE(S)
<i>Occhicone v. State</i> , 768 So. 2d 1037 (Fla. 2000).....	1
<i>Occhicone v. State</i> , 570 So. 2d 902 (Fla. 1990).....	1, 7, 8
<i>Robards v. State</i> , 214 So. 3d 568 (Fla. 2017)	14
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	18
<i>Sireci v. Florida</i> , 137 S. Ct. 470 (2016)	12
<i>Skinner v. Oklahoma ex rel. Williamson</i> , 316 U.S. 535 (1942).....	10
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	11
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	22
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	11
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	19
<i>Williams v. State</i> , 110 So. 2d 654 (Fla.1959).....	13
<i>Williams v. State</i> , 209 So. 3d 543 (Fla. 2017)	12
<i>Zommer v. State</i> , 160 So. 3d 368 (Fla. 2010)	14
 CONSTITUTION	 PAGE(S)
U.S. CONST. art. VI, cl. 2.	2
U.S. CONST. amend. VI.....	2
U.S. CONST. amend. VIII	2
U.S. CONST. amend. XIV	2, 15

TABLE OF AUTHORITIES - CONTINUED

STATUTES	PAGE(S)
28 U.S.C. § 1257(a)	1
FLA. STAT. § 921.141	<i>passim</i>
OTHER AUTHORITIES	PAGE(S)
<i>Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General</i> , 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999).....	12

PETITION FOR WRIT OF CERTIORARI

Dominick A. Occhicone respectfully petitions for a writ of certiorari to review the errors in judgment of the Florida Supreme Court.

OPINIONS BELOW

This is a petition regarding the errors of the Florida Supreme Court in denying Mr. Occhicone's claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The opinion at issue appears at *Appendix A* and is reported at *Occhicone v. State*, 235 So. 3d 299 (Fla. 2018). The order denying Mr. Occhicone's *Hurst* claim from the Circuit Court of the Sixth Judicial Circuit in and for Pasco County appears at *Appendix D*. On direct appeal, the opinion of the Florida Supreme Court is reported at *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990) (Kogan, J., concurring as to the convictions and dissenting as to the sentence of death), *cert. denied*, 500 U.S. 938 (1991) and appears at *Appendix F*. The opinion of the Florida Supreme Court following his initial post-conviction review is reported at *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000) and appears at *Appendix E*. The order of the trial court imposing the death penalty is unreported and appears at *Appendix G*.

JURISDICTION

The Florida Supreme Court decided the case on January 30, 2018. On April 9, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to June 29, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Section 921.141, Florida Statutes (1987), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence —" provides as follows:

(2) **ADVISORY SENTENCE BY THE JURY**, - After hearing all the evidence, the jury shall deliberate and *render an advisory sentence to the court*, based upon the following matters:

- (a) Whether sufficient aggravating circumstances existed as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH**, - Notwithstanding the *recommendation of a majority of the jury*, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but *if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based* as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5),

and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

FLA. STAT. § 921.141 (1987) (emphasis added); *Appendix L*.

STATEMENT OF THE CASE

Trial Court Proceedings

Mr. Occhicone is an almost 73 year old man currently housed in the solitary confinement of death row in Florida. He has been housed in death row for almost 30 and a half years and incarcerated for about 32 years. On July 15, 1986, Mr. Occhicone was indicted in the Circuit Court of the Sixth Judicial Circuit Court in and for Pasco County with the June 10, 1986 first-degree murders of Mr. Raymond Artzner and Mrs. Martha Artzner. The victims were the parents of Mr. Occhicone's former girlfriend/fiancée, Ms. Anita Gerrety.¹

In 1987, and prior to his jury trial, Mr. Occhicone filed a number of motions challenging Florida's sentencing scheme. In particular, Mr. Occhicone vigorously litigated the constitutionality of FLA. STAT. § 921.141², the sentencing scheme under which he was given the death penalty. *Appendix L.* Mr. Occhicone filed a motion to declare section 921.141 Florida Statutes (1985)³, unconstitutional on April 30, 1987. *Appendix H.* Mr. Occhicone also filed a motion to declare that death is not a possible penalty on April 30, 1987. *Appendix I.* Both motions were denied by the trial court on September 15, 1987. *Appendix I; J.*

A little over a year after the indictment, a jury convicted Mr. Occhicone for both counts of first-degree murder. That advisory jury recommended a death sentence for each count by a ***bare majority vote of 7 to 5***. The trial court independently assessed the aggravators and mitigators. Justice Kogan, in his dissent, specifically noted that the trial court found that Mr. Occhicone was

¹ Mr. Occhicone and Ms. Gerrety began dating in 1982 and were engaged to be married in 1985. They lived together for a period of six months in 1984, along with Ms. Gerrety's two children and Mr. Occhicone's five year old son. Ms. Gerrety broke off the engagement in September of 1985. After their engagement was broken, Mr. Occhicone tried to rekindle their relationship by sending flowers at her work and calling her. Further, Ms. Gerrety visited Mr. Occhicone at his home four times during this break-up period.

² This same sentencing scheme was held to be unconstitutional by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

³ The language in the sentencing statute has remained the same from 1985 to 1987.

under the influence of an extreme mental or emotional disturbance at the time of the offense⁴ and that he was a heavy drinker and alcoholic who was suffering from depression. *See Occhicone*, 570 So. 2d at 908⁵; *see Appendix G*. On November 9, 1987, after independently finding and weighing the aggravators and the mitigators, the trial court sentenced Mr. Occhicone to death for the killing of Mrs. Artzner and to life in prison for the killing of Mr. Artzner. *See id.* at 904; *see Appendix G*.

Mr. Occhicone appealed his judgment and sentence to the Florida Supreme Court, who denied it on all grounds on October 11, 1990. *See Occhicone*, 570 So. 2d 902; *see Appendix F*. Mr. Occhicone's motion for rehearing was also denied on December 26, 1990. *See id.* Mr. Occhicone's petition for writ of certiorari was denied by this Court on May 20, 1991. *See Occhicone v. Florida*, 500 U.S. 938 (1991) (Marshall, J., dissenting as to grant of certiorari and sentence of death pursuant to *Gregg v. Georgia*, 428 U.S. 153 (1976)).

Hurst - related Postconviction Court Proceedings

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016) striking down Florida's longstanding capital-sentencing procedures⁶ because they authorized a judge, rather than a jury, to make factual findings that were the necessary precondition for a death sentence. On remand, the Supreme Court of Florida held, as a state constitutional consequence, that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death. *See Hurst v. State*, 202 So. 3d 40 (2016). The

⁴ Statutory mitigator pursuant to FLA. STAT. § 921.121 (6)(b).

⁵ "The [trial] judge found that this depression and alcoholic condition combined to produce in the defendant an extreme mental or emotional disturbance; that fact, coupled with the bizarre facts of this case, indicate a crime committed by a mentally and emotionally disturbed individual. I can only conclude that death is not proportionate here." 570 So. 2d at 908 (Kogan, J., dissenting as to the sentence of death).

⁶ Florida's capital sentencing procedure which had been in effect (with minor, presently irrelevant changes) since December 8, 1972.

Supreme Court of Florida then addressed the question of the retroactive application of the federal constitutional rule of *Hurst v. Florida* to the State's approximately 380 condemned inmates. *Hurst* (decided on January 12, 2016) had followed *Ring v. Arizona*⁷ (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*⁸ (decided on June 26, 2000) that all facts necessary for criminal sentencing enhancement must be found by a jury. Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley*⁹ that inmates whose death sentences were not yet final on June 24, 2002 (the date of *Ring*, precursor of *Hurst*¹⁰) were entitled to resentencing under *Hurst v. Florida*. Further, the Supreme Court of Florida held in *Asay*¹¹ that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing.¹²

⁷ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

⁸ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁹ 209 So. 3d 1248 (Fla. 2016).

¹⁰ 136 S. Ct. 616 (2016).

¹¹ 210 So. 3d 1 (Fla. 2016).

¹² A comparison of the reasoning of the Florida Supreme Court in *Mosley* and *Asay* is puzzling:

(1) In *Mosley*, the court articulates two state-law tests for retroactivity: a "fundamental fairness" test deriving from *James v. State*, 615 F. 2d 668 (Fla. 1993); and a three-factor test deriving from *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The relationship between the two tests is not clear: at one point the *Mosley* opinion appears to treat *Witt* as refining the *James* test (*Witt* "involves a more in-depth consideration of how to analyze when fairness must yield to finality based on changes in the law" [209 So. 3d at 1276]), but at another point it says that "[t]his Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty" (209 So. 3d at 1274-1275). However, the same court's *Asay* opinion makes no reference at all to the *James* test: *James* is not discussed or even cited, and its omission is unexplained.

(2) Florida's *Witt* test closely resembles this Court's pre-*Teague* formula in *Linkletter v. Walker*, 381 U.S. 618 (1965) *disapproved of by Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Stovall v. Denno*, 388 U.S. 2931, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). It considers three factors. In discussing the first factor, "Purpose of the New Rule" (209 So. 3d at 1277), the *Mosley* court concludes that it "weighs heavily in favor of retroactive application" (209 So. 3d at 1278). The *Asay* opinion, discussing the same factor - and describing the "purpose" of *Hurst* no differently than does the *Mosley* opinion - concludes more modestly that this factor "weighs in favor of applying *Hurst v. Florida* retroactively" (210 So. 3d at 10).

(3) The second *Witt* factor is "Reliance on the Old Rule" (*Mosley*, 209 So. 3d at 1278). Analyzing this factor in *Mosley*, the court says it "weighs in favor of granting retroactive relief to the point of the issuance of *Ring*" (209 So. 3d at 1281) "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002" (209 So. 3d at 1280). In *Asay*, the second *Witt* factor "weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case" (210 So. 3d at 12) because "this Court's reliance on the old rule has spanned decades' worth of capital cases, with 386 inmates currently

After the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State*¹³ were rendered, Mr. Occhicone timely filed a successive motion to vacate his sentence of death pursuant to Florida Rule of Criminal Procedure 3.851 on January 9, 2017.¹⁴ After a case management conference, the postconviction court denied Mr. Occhicone *Hurst* review or relief by order rendered May 18, 2017. *Appendix D*. Mr. Occhicone appealed the denial of his successive motion to vacate his sentence of death to the Florida Supreme Court. On June 14, 2017, the Florida Supreme Court issued an order staying the appeal, pending the court's disposition in *Hitchcock v. State*, SC17-445. *Appendix C*.

Thereafter the Supreme Court of Florida issued an opinion in *Hitchcock v. State* denying Mr. Hitchcock relief. *See* 226 So. 3d 216 (Fla 2017) (Pariente, J. dissenting; Lewis, J., concurring) *reh'g denied*, SC17-445, 2017 WL 4118830 (Fla. Sept. 18, 2017), and *cert. denied sub nom. Hitchcock v. Florida*, 138 S. Ct. 513 (2017). Pursuant to its decision in *Asay*¹⁵, the Florida

residing on death row and 92 executions carried out since 1976" (*id.*). Notably, (a) the figure "386" includes both the *Mosley* and the *Asay* cohorts; the court invokes as a reliance concern in *Asay* at least 159 cases in which it held retroactive relief appropriate in *Mosley*, plus another 60 cases in which it would deny retroactive relief on harmless-error grounds; and (b) although the *Asay* court mentions in an introductory historical passage that it had rejected a *Ring* claim - the same claim that prevailed in *Hurst v. Florida* - in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), it does not discuss *Bottoson* in its reliance analysis and thus does not explain why Florida prosecutors and courts were less entitled to rely on the constitutionality of Florida's unchanged statutory sentencing scheme after *Ring* (and *Bottoson*) than before.

(4) The third *Witt* factor is "Effect on the Administration of Justice" (*Mosley*, 209 So. 3d at 1281). In its analysis of this factor, the *Mosley* court says that "[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual" (209 So. 3d at 1281): "[H]olding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief" (209 So. 3d at 1282). The *Asay* court, in contrast, concludes that the "Effect" factor "weighs heavily against applying *Hurst v. Florida* retroactively to *Asay*" (210 So. 3d at 13). It says nothing about the considerations that "convictions will not be disturbed" and that "not every defendant . . . will ultimately receive relief" since some defendants waived jury trial and others will be unable to establish that *Hurst* error was prejudicial (see *Mosley*, (209 So. 3d at 1282)).

¹³ 209 So. 3d 1248 (Fla. 2016).

¹⁴ Mr. Occhicone's initial motion to vacate judgment and sentence was denied by the Florida Courts. *See Occhicone v. State*, 570 So. 2d 902 (Fla. 1990); *see Appendix E*.

¹⁵ 210 So. 3d 1.

Supreme Court denied *Hurst*¹⁶ review to all defendants whose death sentences were final prior to June 24, 2002, when *Ring* was decided by this Court. *See id.* at 217.¹⁷ Thus, the Supreme Court of Florida issued an order directing Mr. Occhicone to show cause as to why the lower court's order should not be affirmed in light of the court's decision in *Hitchcock*. *See Appendix B*.

On January 30, 2018, the Florida Supreme Court denied Mr. Occhicone relief. *See Occhicone v. State*, 235 So. 3d 299 (Fla. 2018); *Appendix A*. The Florida Supreme Court in affirming the lower court's denial held as follows:

After reviewing Occhicone's response to the order to show cause, as well as the State's arguments in reply, we conclude that Occhicone is not entitled to relief. Occhicone was sentenced to death following a jury's recommendation for death by a vote of seven to five. *See Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990). His sentence of death became final in 1991. *Occhicone v. Florida*, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991). Thus, *Hurst* does not apply retroactively to Occhicone's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Occhicone's motion.

Occhicone, 235 So. 3d at 300 (internal footnote omitted) (internal citations re-formatted). This ruling is before this Court for review.

¹⁶ 136 S. Ct. 616.

¹⁷ Justice Lewis wrote the following powerful concurrence:

Every pre-*Ring* defendant has been found by a jury to have wrongfully murdered his or her victim. There may be defendants that properly preserved challenges to their unconstitutional sentences through trial and direct appeal, but this Court now limits the application of *Hurst*, which may result in the State wrongfully executing those defendants. It seems axiomatic that "two wrongs don't make a right"; yet, this Court essentially condones that outcome with its very limited interpretation of *Hurst*'s retroactivity and application.

Hitchcock, 226 So. 3d at 219-20 (Fla. 2017) (internal citations re-formatted). Justice Pariente also wrote an equally strong dissent as to the partial retroactive application of *Hurst* in Florida.

“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”

Hurst v. Florida, 136 S. Ct. 616, 618 (2016)

REASONS FOR GRANTING THE WRIT

When the Florida Supreme Court drew an arbitrary line between inmates condemned before June 24, 2002 and those sentenced after, it violated both the Supremacy Clause and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This petition should be granted and further briefing should be ordered to fully and fairly assess the impacts of the *Hurst v. Florida* decision on all of Florida’s death row inmates.

I. By Denying Mr. Occhicone the Benefit of the *Hurst* Decision, the Florida Supreme Court Violated the Sixth, Eighth and Fourteenth Amendments of the United States Constitution

*Hurst v. Florida*¹⁸ followed *Ring* in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi*, 530 U.S. 466¹⁹. This Court held that all facts necessary for criminal sentencing enhancements must be found by a jury. *See Hurst*, 136 S. Ct. at 618. Applying Florida’s retroactivity doctrines, the Florida Supreme Court held that inmates whose death sentences were not final on June 24, 2002 were entitled to resentencing under *Hurst* and that inmates whose death sentences became final before

¹⁸ 136 S. Ct. 616.

¹⁹ Justice Scalia in his concurrence reinforced the Sixth Amendment right to a jury trial as follows:

And the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,” has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.

Apprendi, 530 U.S. at 498-99 (2000) (emphasis in original) (Scalia, J. concurring); *see also Blakely v. Washington*, 542 U.S. 296, 301-302 (2004) (“Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*’s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges’ intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.” (Scalia, J. writing for majority)).

June 24, 2002 were not entitled to resentencing. *See Mosley*, 209 So. 3d 1248; *see Asay*, 210 So. 3d 1.

On remand from *Hurst v. Florida*, the Florida Supreme Court implemented the Sixth Amendment ruling by interpreting its state constitution and statute as requiring that a jury's death verdict must rest upon findings that include the sufficiency of aggravation and its preponderance over mitigation, so that a death sentence should be recommended; and it held that these findings must be unanimous. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Hitchcock*, the Florida Supreme Court held that these state-law rights—as well as the federal Sixth Amendment jury-trial right—would be applied retroactively to the *Mosley* cohort but denied to the *Asay* cohort. *Hitchcock v. State*, 226 So. 3d 216. The lives of as many as 164 Florida citizens, including Mr. Occhicone, may hang on this Court's approval of the Florida Supreme Court's interpretation.

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

The second principle, from *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in

Teague v. Lane, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines. To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers: What all of Florida's death row inmates have in common is that they were all sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial—a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century. See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Bottoson v. Florida*, 537 U.S. 1070 (2002) (denying *certiorari* review of *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002)). Even in 1987, Mr. Occhicone challenged Florida's sentencing scheme, albeit unsuccessfully. *Appendix H-K*. Yet despite his earlier efforts, Mr. Occhicone will be subject to execution all because he was sentenced prior to June 24, 2002. This Court must make *Hurst* applicable to all capital defendants who were sentenced under Florida's unconstitutional sentencing scheme to ensure the guaranteed protections of the Sixth, Eighth, and Fourteenth Amendments. Florida cannot gain the benefit for violating the constitutional rights of capital defendants like Mr. Occhicone by executing them pursuant to an unconstitutional sentencing law.

There are other critical inequalities in the treatment of Florida's Death Row inmates. First, inmates whose death sentences became final before June 24, 2002 have been on death row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to the prison environment and continuing to live without endangering any valid interest of the State. Second, inmates whose death sentences became final before June 24,

2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. “This Court, speaking of a period of *four weeks*, not 40 years, once said that a prisoner’s uncertainty before execution is ‘one of the most horrible feelings to which he can be subjected.’” *Id.* at 470. “At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.” *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of *certiorari*). Third, inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence - or even a capital prosecution - under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2017 standards. We cannot say which specific cases would or would not; but it is plain generically that some inmates condemned to die before *Ring* would receive less than capital sentences today.

Moreover, partial retroactivity would render these illegal death sentences cruel and unusual punishment and a grave injustice under the Eighth Amendment. There are a number of condemned men and women whose cases have facts similar or more egregious than in Mr. Occhicone’s case, but they will be afforded the right to *Hurst* review simply because they have the fortune of having cases that became final after *Ring*. In addition, they will be granted *Hurst* relief if the recommendation is non-unanimous, as in Mr. Occhicone’s case. *See, e.g., Williams v. State*, 209

So. 3d 543 (Fla. 2017) (Convicted of kidnapping, robbery, and first degree murder of 81 year old Janet Patrick, who was abducted from a Publix. Jury recommendation was 9-3); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (Convicted of the kidnapping, sexual battery, and stabbing and beating of Deborah Tressler, who was found dead in a wooded area. Jury recommendation was 8-4); *Hodges v. State*, 213 So. 3d 863 (Fla. 2017) (Convicted of the first-degree murder by bludgeoning with a hammer and stabbing with a knife of the victim in her home. There was also evidence that the defendant was engaged in a sexual battery or attempted sexual battery when he killed the victim. There was *Williams v. State*, 110 So. 2d 654 (Fla.1959) rule evidence of a collateral murder introduced. Jury recommendation was 10-2); *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997) (Convicted of the first-degree murder, burglary of a dwelling, sexual battery with physical force, kidnapping and robbery of 80 year old Dorothy Berger. Jury recommendation was 11-1); *Durousseau v. State*, 218 So. 3d 405 (Fla. 2017) (Convicted of the first-degree murder by strangulation of a young female victim, whose body was found nude from the waist down by her sister and stepfather. At the time, Durousseau had been indicted on five counts of first-degree murder for the deaths of five women where he used the same methodology as in this case. Jury recommendation was 10-2); *Ault v. State*, 213 So. 3d 670 (Fla. 2017) (Convicted of two counts first-degree murder, two counts of sexual battery on a child under twelve years old, two counts of kidnapping a child under thirteen years old and two counts of aggravated child abuse. The victims were sisters aged eleven and seven. Jury recommendation was 9-3 on each victim); *Deviney v. State*, 213 So. 3d 794 (Fla. 2017) (Convicted of the first-degree murder of a petite elderly 65 year old woman with multiple sclerosis who was cut from ear-to-ear and was found nude from the waist down. Jury recommendation was 8-4); *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (Convicted of first-degree murder, sexual battery with a deadly weapon, second degree arson and grand theft

motor vehicle. The victim was a mother who was stabbed and found dead in a van that was set on fire after her death. Jury recommendation was 11-1); *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (Convicted of the First degree murder, attempted first degree murder, robbery with a firearm, and fleeing to elude a law enforcement officer operating a marked vehicle. The victims of the murder and attempted murder were residents of a retirement community. Jury recommendation was 11-1); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (Convicted of two counts of murder; strangulation death of victim Lynda Wilkes and the death of infant Jay-Quan by placing him crying into a tied garbage bag. Jury recommendation was 8-4); *Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (Convicted of the first-degree premeditated murder, first-degree murder, and shooting into a building arising from the death of a 8 year old child. Jury recommendation was 8-4); *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (Convicted of first-degree murder of Sergeant Ruben Thomas who was a corrections officer at a prison facility where Franklin was serving life sentences for prior convictions of first-degree murder and armed robbery with a firearm. Jury recommendation was 9-3); *Abdool v. State*, 220 So. 3d 1106 (Fla. 2017) (Convicted of the first-degree murder by burning the victim alive. Jury recommendation was 10-2); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (Convicted of first-degree murder of Deputy John Greeny and the attempted murder of Deputy Robert Sallustio and armed robbery. Jury recommendation was 9-3); *Robards v. State*, 214 So. 3d 568 (Fla. 2017) (Convicted of the first-degree murders of an elderly couple, Frank and Linda Deluca. Jury recommendation was 7-5.); *Zommer v. State*, 160 So. 3d 368 (Fla. 2010) (Convicted of the first-degree murder of a 77 year old woman. Jury recommendation was 10-2); *Johnson v. State*, 205 So. 3d 1235 (Fla. 2016) (Convicted of three counts of first-degree murder. Jury recommendation was 11-1 for each victim); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (Convicted of the first degree murder for the shooting death of his wife, who fled his moving

vehicle. Jury recommendation was 10-2); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (Convicted of two counts of first-degree murder, one count of first-degree premeditated murder, one count of attempted first-degree felony murder, three counts of armed kidnapping and two counts of armed robbery. These facts stemmed from the armed robbery of the employees of a Waffle House. Jury recommendation was 9-3). The foregoing limited list of cases clearly demonstrates that partial retroactivity cannot be constitutional when all the defendants were subjected to the same illegal sentencing statute. Despite the truly heinous facts of some of the foregoing listed murders, the condemned defendants will receive the opportunity for a new re-sentencing proceeding if the State continues to seek the death penalty. Mr. Occhicone will not receive the opportunity to be re-sentenced because of an arbitrary date.

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 Asay*, 210 So. 3d at 37-41 (“[U]nder the present majority’s decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after *Ring*, cannot receive the death penalty without the protections articulated in *Hurst*. . . . The majority’s application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated.” (Perry, J. dissenting) (internal footnote omitted)). As a matter of due process and equal protection of laws under the Fourteenth Amendment of the United States Constitution, 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.

Finally, inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic

fact-finding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence, including flawed forensic-science theories and practices like eyewitness identification testimony. This evidence was accepted without question in pre-*Ring* capital trials. Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and unhesitating death sentences a couple of decades ago would be substantially less convincing to prosecutors and juries today. Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. However, the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial. Even if a prosecutor opts to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

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

II. The *Hurst* Decisions Announced Substantive Constitutional Rules and the Supremacy Clause of the United States Constitution Requires State Courts to Apply Those Rules Retroactively to All Cases on Collateral Review

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause of the Constitution requires state courts to apply “substantive” constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner’s claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34. The Court explained that “*the Constitution* requires state collateral review courts to give retroactive effect to that rule,” *id.* at 728-29 (emphasis added), and that, “[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” *Id.* at 731-32.

The *Montgomery* Court found the *Miller* rule substantive even though the rule had “a procedural component.” *Id.* at 734. *Miller* did “not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*.” *Miller*, 567 U.S. at 483. Instead, “it mandate[d] only that a sentence follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.* Despite *Miller*’s procedural mandates, the Court in *Montgomery* warned against, “conflat[ing]

a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Instead, the Court explained, “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish,” and that the necessary procedures do not “transform substantive rules into procedural ones.” *Id.* at 735.

The *Hurst* decisions announced substantive rules that should have been applied retroactively to Mr. Occhicone by the Florida Supreme Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance beyond a reasonable doubt; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

Second, an Eighth Amendment rule was established that requires the elements to be found unanimously by the jury. The substantive nature of the unanimity rule is apparent from the Florida Supreme Court’s explanation in *Hurst v. State* that unanimity: (1) is necessary to ensure

compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida’s death-sentencing scheme complies with the Eighth Amendment and to “achieve the important goal of bringing [Florida’s] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.” *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

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*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable fact-finding procedures could not legitimate a sentence based on” the judge-sentencing scheme. *Id.* 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 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state’s power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst*

decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters . . . the class of persons that the law punishes”).

Hurst retroactivity is not undermined by this Court’s holding in *Summerlin*, 542 U.S. at 364 that *Ring* was not retroactive in a federal habeas case. *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 death 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* when the Court found it unconstitutional for a judge alone to find that “sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” 136 S. Ct. at 622 (internal citation omitted). Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and proof-beyond-a-reasonable-doubt decisions are substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).²⁰

The “harmless error” doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury’s unanimous recommendation to sentence Mr. Occhicone to death. This Court’s per se rule that *Hurst* errors are harmless in every case where the pre-*Hurst* jury unanimously recommended death, *see, e.g., Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Mr. Occhicone’s jury made only a *recommendation by a bare majority*

²⁰ *Hurst* errors should be deemed “structural” and not subject to harmless review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst* - stripping the capital jury of its constitutional fact-finding role - represents a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. *Hurst* errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and “deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination” of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law.²¹ This Court cannot reliably infer that a jury would have unanimously found all the requisite elements for a death sentence especially in a bare majority recommendation case. *See Hall v. State*, 212 So. 3d 1001, 1037 (Quince, J., dissenting).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Mr. Occhicone's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot be certain that the jury would have made the same recommendation without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). *See Boyde v. California*, 494 U.S. 370, 380 (1990) (the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence).

The jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the jury's findings on each of the elements required for a death sentence, rather than the court's own findings on those elements. *See Hurst v. State*, 202 So. 3d at 57 (noting

²¹ In addition, the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution as well as the Florida Constitution may dictate the retroactive application of Florida's new death penalty statute. *See* FLA. STAT. § 921.141 (2017).

that nothing in *Hurst* has diminished “the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.”); FLA. STAT. § 921.141(3)(2) (2017) (Florida’s capital sentencing statute provides an opt-out provision for the court, which may impose a sentence of life imprisonment without the possibility of parole despite unanimous death verdict).

As a matter of federal constitutional law, any reliance on the jury’s recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that “harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict.”). In Mr. Occhicone’s case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. In Mr. Occhicone’s case, any reliance on his advisory jury’s recommendation would constitute a violation of the Sixth Amendment. It should be noted again that Mr. Occhicone litigated that Florida’s sentencing scheme was unconstitutional in 1987.

Appendix H-K.

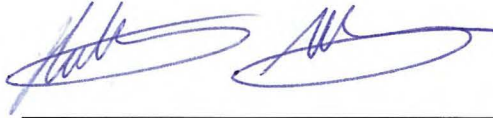
In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that “the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” 508 U.S. at 278. “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a

reasonable doubt. . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Florida’s pre-*Hurst* jury determinations, including the advisory recommendation in Mr. Occhicone’s case, did not incorporate the beyond-a-reasonable-doubt standard.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing in Mr. Occhicone's case.

Respectfully submitted



Raheela Ahmed
Counsel of Record
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us



Maria Christine Perinetti
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us



Lisa Marie Bort
Florida Bar Number 119074
Email: bort@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601

June 19, 2018.
Dated