No. _____

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

Supreme Court of Florida

No. SC17-847

DONALD DAVID DILLBECK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 24, 2018]

PER CURIAM.

We have for review Donald David Dillbeck's appeal of the circuit court's order denying Dillbeck's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Dillbeck's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Dillbeck's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017).

After this Court decided Hitchcock, Dillbeck responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Dillbeck's response to the order to show cause, as well as the State's arguments in reply, we conclude that Dillbeck is not entitled to relief. Dillbeck was sentenced to death following a jury's recommendation for death by a vote of eight to four. Dillbeck v. State, 643 So. 2d 1027, 1028 (Fla. 1994). Dillbeck's sentence of death became final in 1995. Dillbeck v. Florida, 514 U.S. 1022 (1995). Thus, Hurst does not apply retroactively to Dillbeck's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Dillbeck's motion.

The Court having carefully considered all arguments raised by Dillbeck, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

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

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Leon County,
Angela Cote Dempsey, Judge - Case No. 371990CF002795AXXXXX

Baya Harrison, III, Monticello, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

MONDAY, SEPTEMBER 25, 2017

CASE NO.: SC17-847
Lower Tribunal No(s).:
371990CF002795AXXXXX

DONALD DAVID DILLBECK vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, October 26, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Monday, November 6, 2017, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

Appellant's Motion to Lift Stay and Set Briefing Schedule is hereby denied.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

BAYA HARRISON III
CHARMAINE M. MILLSAPS

EXHIBIT 3

IN THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

v. Case No. 1990 CF 2795

DONALD DAVID DILLBECK,

Defendant.

_____/

ORDER ON SUCCESSIVE RULE 3.851 MOTION FOR POSTCONVICTION RELIEF

Pending before the Court is a successive rule 3.851 motion for postconviction relief raising a claim based on Hurst v. Florida, 136 S.Ct. 616 (2016) (Hurst v. Florida), and Hurst v. State, 202 So.3d 40 (Fla. 2016) (Hurst II). The motion is summarily denied because Hurst is not retroactively applicable to Dillbeck under controlling Florida Supreme Court precedent.

Procedural History of the Current Successive Motion

On April 11, 2016, Dillbeck, represented by registry counsel Baya Harrison, filed Defendant's Second Successive Motion for Postconviction Relief raising a Sixth Amendment right-to-a-jury-trial claim based on Hurst v. Florida, 136 S.Ct. 616 (2016) (Hurst v. Florida). On April 28, 2016, the State filed an answer to the successive motion. On May 27, 2016, Dillbeck also filed a motion to stay the case pending the decision from the Florida Supreme Court on remand from the United States Supreme Court. Following a status hearing, this Court granted the motion to stay the case.

On October 14, 2016, the Florida Supreme Court issued its opinion on remand in Hurst v.

State, 202 So.3d 40 (Fla. 2016) (Hurst II). On December 22, 2016, the Florida Supreme Court decided Asay v. State, 210 So. 3d 1 (Fla. 2016), which determined the retroactivity of Hurst under Florida law to older cases.

On January 23, 2017, Dillbeck filed a "Supplemental Memorandum of Law Regarding the Applicability of Hurst v. Florida and a Motion to Lift Stay" raising one claim based on both Hurst v. Florida and Hurst II. On February 23, 2017, the State filed a response to the supplemental memorandum. On March 15, 2017, Dillbeck filed a reply.

On March 16, 2017, this Court held another status hearing. At the hearing, the parties agreed that the issue was a matter of law that did not require factual development at an evidentiary hearing. The parties also agreed that the stay should be lifted. The parties additionally agreed that no case management conference was necessary to decide the issue. Fla. R. Crim. P. 3.851(f)(5)(B). The parties instead agreed to rely on the arguments in their pleadings.

Findings of Fact and Conclusions of Law

The motion is denied because Hurst II is not retroactively applicable to Dillbeck under the controlling Florida Supreme Court precedent. Asay v. State, 210 So. 3d 1 (Fla. 2016); Gaskin v. State, ___ So.3d ___, 2017 WL 224772, No. SC15-1884 (Fla. Jan. 19, 2017). Under Asay and Gaskin, a capital defendant is not entitled to Hurst relief if his death sentence became final before June 24, 2002, when the United States Supreme Court decided Ring v. Arizona, 536 U.S. 584 (2002). Dillbeck's sentence became final on March 20, 1995, when the United States Supreme Court denied his petition for writ of certiorari. Dillbeck v. Florida, 514 U.S. 1022 (1995).

Because Dillbeck's sentence was final years before Ring, he is not entitled to any relief pursuant to Hurst.

Dillbeck argues that there is a second test for retroactivity relying on the discussion of fundamental fairness in Mosley v. State, 209 So.3d 1248 (Fla. 2016). While Dillbeck is entitled to make this argument to the Florida Supreme Court, this Court must follow the controlling precedent of Gaskin, which was decided after Mosley, and which relied solely on the date of finality to determine retroactivity. Under current precedent, Hurst does not apply retroactively to Dillbeck because his sentence was final before Ring.

Accordingly, Defendant's Second Successive Motion for Postconviction Relief filed April 11, 2016, is SUMMARILY DENIED. The Defendant shall have 30 days from the date of rendition of this order to take an appeal to the Florida Supreme Court by filing a notice of appeal with the Clerk of the Court.

DONE AND ORDERED in Leon County, Florida this 11 of April, 2017.

Angela C. Dempsey,
Circuit Judge

copies to:
Baya Harrison, III, Esq.
Charmaine Millsaps, Esq.
Eddie Evans, Esq.
Donald Dillbeck (via Mr. Harrison)

EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v. Case No. SC17-847

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW the Appellant, Donald Dillbeck ("Dillbeck"), through undersigned counsel, and files this Response to the Order to Show Cause issued September 25, 2017 in the above-styled case.

Relevant Facts and Procedural History

1. Dillbeck was convicted of first-degree murder, armed robbery and armed burglary, and sentenced to death. The convictions and sentence were affirmed on direct appeal in 1994. *Dillbeck v. State,* 643 So. 2d 1027 (Fla. 1994).

2. Following several unsuccessful postconviction challenges, Dillbeck filed on April 11, 2016 a "Second Successive Motion for Postconviction Relief under Fla. R. Crim. P. 3.851 ("motion"), raising a single claim that his death sentence violates the Sixth Amendment right to trial by jury and Eighth Amendment right to unanimous jury verdict based on *Hurst v. Florida,* 136 S. Ct.

616 (2016) (Hurst I) and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) (Hurst II).

3. On December 22, 2016, during the pendency of Dillbeck's motion in the Circuit Court, this Court held in *Asay v. State,* 210 So. 3d 1 (Fla. 2016), that the *Hurst* decisions do not apply retroactively to any defendant whose death sentence was imposed and became final prior to the United States Supreme Court's decision in *Ring v. Arizona* on June 24, 2002. In *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), this Court held that *Hurst* does apply retroactively to death sentences that became final after *Ring.*

4. On January 23, 2017, Dillbeck filed a supplemental memorandum of law setting forth various arguments for applying *Hurst* notwithstanding the cut-off date established in *Asay* and *Mosley.*

5. Following a status hearing, the Circuit Court entered a final order denying the motion on non-retroactivity grounds on April 11, 2017.

6. Dillbeck timely appealed the Circuit Court's order to this Court. The record ("R") was filed on May 26, 2017.

7. On June 5, 2017, the Court entered an order to stay this appeal pending a decision in *Hitchcock v. State,* Case No. SC17-445.

8. On August 10, 2017, the Court entered an opinion disposing of the Hitchcock case. *Hitchcock v. State*, 2017 WL 3431500 (Fla. August 10, 2017).

9. On September 25, 2017, the Court entered an order directing Dillbeck to show cause why this appeal should not be dismissed in light of the *Hitchcock* decision. This response follows.

Why the Order to Show Cause Should be Discharged

The order to show cause should be discharged because this appeal presents two issues that were not litigated or decided in *Hitchcock,* and which are not subject to any procedural bar. *See generally State v. McBride,* 848 So. 2d 287 (Fla. 2003) (discussing issue and claim preclusion). Article I, Section 21 of the Florida Constitution guarantees the right of access to the courts to every person.

Two issues to be presented in this appeal that were not decided in *Hitchcock* are (1) whether *Hurst II*, which requires a penalty phase jury to make new findings unanimously and beyond a reasonable doubt, announced a new substantive rule of criminal law independent of *Hurst I* that must be applied retroactively, and (2) whether this Court's retroactivity cut-off date is arbitrary and results in the disparate application of the death penalty based on impermissible factors.

Why this case presents issues not decided in Hitchcock

Dillbeck filed his *Hurst* claim in a successive motion for postconviction relief under Fla. R. Crim. P. 3.851 on April 11, 2016 (R. 127), prior to this Court's determination of whether and to what extent the *Hurst* decisions apply retroactively. In the motion, Dillbeck made a standard retroactivity argument under

Witt v. State, 387 So. 2d 922 (Fla. 1980) (R. 134-138). In *Asay* and *Mosley,* the Court engaged in separate *Witt* analyses for defendants who were sentenced to death prior to *Ring* and those sentenced after *Ring.*

After this Court established a cut-off date for retroactivity at the date of the *Ring* decision, Dillbeck filed a supplemental pleading setting forth three arguments why *Hurst* should be applied to his case notwithstanding *Asay.* Dillbeck's arguments were (1) that it would be fundamentally unfair not to apply *Hurst* to Dillbeck for the reasons set forth in *James v. State,* 615 So. 2d 668 (Fla. 1993), and *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), because Dillbeck raised issues at trial similar to those decided in *Hurst* (R. 159-164), (2) *Hurst II,* which established an Eighth Amendment right to a unanimous jury verdict in capital sentencing proceedings and assigned a burden of proof beyond a reasonable doubt to the jury's findings, announced a new substantive rule of criminal law that must be applied retroactively to all defendants, including those sentenced to death prior to the *Ring* decision (R. 164-168), and (3) *Hurst* meets the federal test for retroactivity under *Stovall v. Denno* and *Linkletter v. Walker* (R. 159 n.10). Dillbeck also argued that his sentence was imposed arbitrarily without the individualized sentencing guaranteed by the Eighth Amendment (R. 166).

The initial brief filed in *Hitchcock* raised the fundamental fairness and federal retroactivity arguments. However, the question of whether *Hurst II*

announced a new substantive rule of criminal law was not raised as a stand-alone basis for applying *Hurst* retroactively[1], nor did this Court address that issue in its opinion[2]. To date, this Court has not expressly addressed this question in any Florida case. *Asay* and *Mosley* only applied the test for retroactivity of new procedural rules.

Furthermore, although Hitchcock raised Eighth Amendment arguments, he did not assert that the June 24, 2002 retroactivity cut-off date is arbitrary and results in disparate treatment of similarly situated prisoners, nor did this Court address that issue in its opinion. Therefore, this Court's decision in *Hitchcock* does not bar consideration of these two questions.

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[1] Hitchcock only argued substantive law in the context of his federal retroactivity argument, asserting *inter alia* that the Sixth Amendment right announced in *Hurst I* is substantive.

[2] As framed by the Court, the arguments presented in *Hitchcock* were (1) The Hurst error in his case was not harmless because his jury did not unanimously recommend death; (2) denying Hitchcock Hurst relief based on non-retroactivity violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution; (3) Hitchcock was denied his right to a jury trial on the facts that led to his death sentence; (4) Hitchcock's death sentence violates the Eighth Amendment because it was contrary to evolving standards of decency and is arbitrary and capricious; (5) the fact-finding that subjected Hitchcock to death was not proven beyond a reasonable doubt; (6) Hitchcock's death sentence violates Article I, Sections 15(a) and 16(a) of the Florida Constitution because the State did not present the aggravating factors in his indictment, and the aggravating factors were not found by his grand jury, thereby denying him notice of the full nature and cause of the accusation against him; and (7) the denial of Hitchcock's prior postconviction claims must be reheard and determined under a constitutional framework. *Hitchcock v. State,* 2017 WL 3431500 at *1 n.2 (Fla. August 10, 2017).

1. Why *Hurst II* Announced a New Substantive Rule of Law

In *Hurst v. Florida,* the United States Supreme Court held that Florida's death penalty scheme violated the Sixth Amendment right to trial by jury. *Hurst I,* 136 S. Ct. at 622. Both the U.S. Supreme Court and this Court have characterized the Sixth Amendment jury trial right in capital sentencing as procedural and held that it is not retroactive. *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004); *Johnson v. State,* 904 So. 2d 400 (Fla. 2005). Rules that merely allocate decision-making authority are prototypical procedural rules. *Summerlin,* 124 S. Ct. at 2523.

However, this Court's decision in *Hurst II* was not limited to the Sixth Amendment jury trial right. The Court also imposed a unanimous jury verdict requirement on Eighth Amendment grounds, and assigned a burden of proof beyond a reasonable doubt to all of the factual findings required by § 921.141. For the reasons that follow, both of these new rules are substantive rather than procedural in nature. As a result, the Court's *Witt* analysis of the procedural rules announced in *Ring* and *Hurst I,* which concerned only the Sixth Amendment right to trial by jury, is not dispositive of whether the rules announced in *Hurst II* should be applied retroactively to all cases.

By definition, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004); *Welch v. United States,* 136 S. Ct. 1257, 1265

(2016). Regardless of whether the underlying constitutional guarantee is characterized as procedural or substantive, if the function of the rule is to alter the class of persons that the law punishes, the rule is substantive. *Id* at 1266; *see also Montgomery v. Louisiana,* 136 S. Ct. 718, 728 (2016) (stating that "substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'").

In *Hurst II,* this Court imposed a requirement that, under the Eighth Amendment, a capital sentencing jury's factual findings and recommendation of death must be unanimous. *Hurst II,* 202 So. 3d at 44. Citing *Furman v. Georgia,* 92 S. Ct. 2726 (1972), the Court reasoned that the Eighth Amendment forbids arbitrary imposition of the death penalty and requires individualized sentencing in which the discretion of the jury and the judge will be narrowly channeled. *Id* at 56. The purpose of individualized sentencing is to establish a system "that narrows the class of murders and murderers for which the death penalty is appropriate…" *Id* at 57 (emphasis added). The Court then stated:

> 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.
>
> * * *
>
> As we hold in this case, the unanimous finding of the aggravating factors and the fact they 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. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

Id at 60 (emphasis added).

Thus, the Court's stated reason for imposing the new rules announced in *Hurst II* was to further narrow the class of persons subject to punishment by death. This is the very definition of a substantive rule. In fact, the language that this Court used in the *Hurst II* opinion is virtually indistinguishable from the definition of a substantive rule of law in both state and federal jurisprudence.

As in all cases announcing a new substantive rule, both the purpose and the effect of the new rule announced in *Hurst II* is to alter the class of persons whom the law punishes, not merely by shifting the role of factfinder from judge to jury, but also by adding new factual findings for the jury to make by unanimous verdict, and a requirement that the ultimate recommendation of death must be unanimous rather than by a mere majority vote. Requiring all twelve jurors to agree that a defendant should be put to death will ensure that the death penalty is truly reserved for the most aggravated and least mitigated of murders.

In addition, this Court in *Hurst II* also assigned a burden of proof beyond a reasonable doubt to the additional findings that the jury is now required to make. First, the jury must find the existence of each aggravating factor beyond a reasonable doubt. *Id* at 44. In addition, the Court indicated in a footnote that the jury's finding that the aggravating factors are sufficient for death is also subject to the standard of proof beyond a reasonable doubt. *Id* at 62 n.18.

This stands in stark contrast to the old rule, which only required the judge to find that the aggravating factors were "not outweighed" by the mitigating evidence. *See Williams v. State,* 967 So. 2d 735, 761 (Fla. 2007) (upholding death sentence despite lack of any express finding that aggravators were sufficient for death). At most, this was a preponderance of the evidence standard when it came to weighing the aggravating factors. Therefore, this Court's ruling in *Hurst II* made additional findings essential to the death penalty and increased the State's burden of proof. These requirements serve a narrowing function and are substantive.

Historically, new rules of law that apply the standard of proof beyond a reasonable doubt are substantive and apply retroactively. *See e.g. Hankerson v. North Carolina*, 97 S. Ct. 2339, 2344-45 (1977) (applying rule of *Mullaney v. Wilbur,* which requires states to prove all elements of crime beyond a reasonable doubt without using presumptions to shift burden to defendant, retroactively to all cases in order to "diminish the probability that an innocent person would be

convicted"); *Ivan V. v. City of New York,* 92 S. Ct. 1951, 1952 (1972) (applying rule announced in *In re Winship,* which applied standard of proof beyond a reasonable doubt to juvenile prosecutions, retroactively to all cases). The rule announced in *Hurst II* should be applied in the same fashion.

One state supreme court has already held that the rule it announced in response to *Hurst I* applies retroactively to all postconviction cases because it allocates the burden of proof. In *Rauf v. State*, the Delaware Supreme Court held that the state's capital sentencing statute was unconstitutional under *Hurst I* because it failed to require juror unanimity, allowed the judge to weigh the aggravating and mitigating circumstances, and did not require a finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *Rauf v. State,* 145 A. 3d 430, 433-434 (Del. 2016).

In *Powell v. Delaware,* 153 A. 3d 69 (Del. 2016), the court then confronted the issue of whether the new rule announced in *Rauf* should be applied retroactively. Citing *Ivan V.,* the court reasoned that increasing the burden of proof from the preponderance of the evidence standard to a beyond a reasonable doubt standard implicates fact-finding reliability under the Due Process Clause, without which the truth-finding function of a criminal trial is substantially impaired. *Id* at 75. *Powell* quoted the following language from *Ivan V:*

> *Winship* expressly held that the reasonable-doubt standard "is a prime instrument for reducing the risk of

> convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' … 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of … convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

Ivan V., 92 S. Ct. at 1952.

Powell was decided on Sixth Amendment grounds, and the court characterized the new rule as a watershed rule of criminal procedure. *Id* at 74-75. However, the retroactivity ruling was clearly premised in large part on the fact that *Rauf* assigned a burden of proof beyond a reasonable doubt to the jury's findings.

Rauf is persuasive authority. In Florida, the assignment of a burden of proof beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient to warrant a death sentence is akin to Delaware's requirement that the jury find that the aggravating factors outweigh the mitigating factors by the same standard. In both cases, the higher standard of proof installs procedural safeguards rooted in due process that increase the reliability of the truth-finding function and perform a narrowing function that alters the class of persons who will be sentenced to death. For the reasons espoused in *Ivan V.,* these rules should be applied equally

to all capital defendants, including those sentenced to death prior to the announcement of the rule.

Justice Pariente's dissent in *Hughes v. State* illustrates the substantive nature of a rule imposing a burden of proof:

> Two aspects of *Apprendi* are relevant to a determination of retroactivity. The first concerns the identity of the decisionmaker, and is a function of the Sixth Amendment right to trial by jury. The second concerns the burden of proof, and is governed by the Fifth and Fourteenth Amendments' guarantee of due process of law.
>
> I conclude that the determination in *Apprendi* that facts authorizing a particular sentence must be found beyond a reasonable doubt is a new rule of substantive law that warrants retroactive application under *Witt.*

Hughes v. State, 901 So. 2d 837, 851 (Fla. 2005) (Pariente, J., dissenting).

The rule announced in *Hurst II* is substantive because it was intended to narrow the class of murder defendants who are eligible for the death penalty to those cases where all twelve jurors unanimously agree that the State has proven sufficient aggravating factors beyond a reasonable doubt. The prior rule allowed the judge to find by a preponderance of the evidence that the aggravating factors were not outweighed by the mitigation, and allowed the jury to recommend death by a bare majority vote of seven to five. Thus, the new rule does more than merely allocate decision-making authority, and is distinguished from the rule announced in *Hurst I.*

It is well established as a matter of both state and federal law that new substantive rules of constitutional law in criminal cases apply retroactively to all cases. In *Montgomery v. Louisiana,* the U.S. Supreme Court stated that "courts must give retroactive effect to new substantive rules of constitutional law," which are not subject to the general bar against retroactivity. *Montgomery v. Louisiana,* 136 S. Ct. 718, 728 (2016). The Supreme Court reasoned as follows:

> It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

Id at 731.

Just last year in *Walls v. State,* this Court reaffirmed that a new substantive rule that places beyond the authority of the state the power to regulate certain conduct or impose certain penalties constitutes a development of fundamental significance that applies retroactively to all final cases. *Walls v. State,* 213 So. 3d 340 (Fla. 2016). Because this Court's ruling in *Hurst II* serves the narrowing function endemic to substantive rules, it applies to all cases.

2. Why this Court's retroactivity cut-off date is arbitrary and capricious, and violates the Eighth and Fourteenth Amendments

Dillbeck's death sentence became final by the conclusion of direct review on March 20, 1995, when the U.S. Supreme Court denied certiorari. *Dillbeck v. Florida,* 514 U.S. 1022 (1995). To date, this Court has determined that the *Hurst*

decisions are important enough to apply retroactively, but only for those defendants whose death sentences became final after June 24, 2002. *Mosley,* 209 So. 3d 1248; *Asay,* 210 So. 3d 1. The justification for this cut-off date is that this is the date of the U.S. Supreme Court's decision in *Ring v. Arizona,* 122 S. Ct. 2428 (2002), and was the first time the Sixth Amendment right to trial by jury was applied to capital sentencing and Florida's scheme was rendered unconstitutional. *See Asay,* 210 So. 3d at 22; *Mosley,* 209 So. 3d at 1280-81. The Court's separate *Witt* analyses turn on the extent of reliance on the old rule both before and after *Ring,* and the impact on the administration of justice.

This cut-off date is arbitrary, and results in the arbitrary and disparate application of the death penalty upon similarly situated defendants in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Rather than drawing a distinction based on the nature of the offense or the character of the defendant, the Court has drawn a distinction that in many cases is the result of random chance or unforeseen procedural delays, or intentionally dilatory tactics to delay an appeal, factors which have no bearing on whether the case actually merits the death penalty. The Court acknowledged this problem in *Witt,* 387 So. 2d at 926-27, one which is significantly worsened by an incomplete retroactivity ruling.

For example, in *Lugo v. State,* Case No. SC60-93994, the defendant was sentenced to death in 1998, prior to the *Ring* decision, but the docket shows that

there were ten extensions of time filed for preparation of the transcripts. As a result, there was a nearly two-year delay in filing the record on appeal, followed by more extensions of the briefing schedule that caused yet another year of delay. This resulted in the conviction and death sentence being affirmed on February 20, 2003, after the retroactivity cut-off date. *Lugo v. State,* 845 So. 2d 74 (Fla. 2003). Because of this fortuitous sequence of events, Mr. Lugo is entitled to relief under *Hurst.* Had Lugo prosecuted his appeal in a timely manner, his sentence would have become final before the cut-off date and he would be barred.

In *Looney v. State,* the defendant was sentenced to death in 2000 and the sentence was affirmed in 2001, also pre-*Ring*. *Looney v. State,* 803 So. 2d 656 (Fla. 2001). However, Looney sought certiorari in the United States Supreme Court, which was denied on June 28, 2002. *Looney v. Florida,* 536 U.S. 966 (2002). Solely because the Supreme Court denied certiorari four days after the decision in *Ring,* Mr. Looney is entitled to apply *Hurst* retroactively to his case.

Even defendants whose death sentences were affirmed by this Court on the same day are receiving disparate treatment. On October 11, 2001, this Court affirmed the death sentences of James Card and Gary Bowles on direct appeal. *Card v. State,* 803 So. 2d 613 (Fla. 2001); *Bowles v. State,* 804 So. 2d 1173 (Fla. 2001). However, the U.S. Supreme Court denied Bowles' certiorari petition on June 17, 2002, *Bowles v. Florida,* 536 U.S. 930 (2002), and denied Card's

certiorari petition on June 28. *Card v. Florida,* 536 U.S. 963 (2002). Based solely on this minor procedural variance, Mr. Bowles is ineligible for relief and will be put to death while Mr. Card has already had his death sentence vacated. *Card v. State,* 219 So. 3d 47 (Fla. 2017).

The actual age of the case also has little bearing on the Court's arbitrary cut-off date. One of the justifications for not applying *Hurst* retroactively to older cases was the impact on the administration of justice and the difficulty in retrying cases that arose long ago. *See Asay,* 210 So. 3d at 20-21. However, many of these older cases have already been retried due to unrelated errors, resulting in death sentences that became final after the cut-off date. *See e.g. Johnson v. State,* 205 So. 3d 1285 (Fla. 2016) (granting *Hurst* relief to defendant who was sentenced to death in 1981 but retried in 2010); *Parker v. State,* 873 So. 2d 270 (Fla. 2004) (affirming second death sentence of defendant originally tried in 1982 after cut-off date).

To the extent the passage of time makes retrials more problematic, it will be far more difficult to locate witnesses to a murder that was tried in 1981 or 1982 than one tried in the 1990s or early 2000s. As a result, the cut-off date is both over-inclusive and under-inclusive as a means of promoting the administration of justice. The cut-off date still allows *Hurst* to be applied to very old cases that have been retried post-*Ring* and which will be difficult to retry again, but denies relief to newer cases that might be easily retried.

Making *Hurst* retroactive only to the date of the *Ring* decision also unfairly denies relief to defendants who were sentenced to death after the decision in *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000), but whose death sentences became final prior to *Ring*. *Ring* was an extension of the rule announced in *Apprendi* that any fact which increases the maximum punishment for a crime is an offense element that must be submitted to the jury and proven beyond a reasonable doubt. *Id* at 2362-63. In both *Ring* and *Hurst I,* the Supreme Court cited *Apprendi* as the foundation for its decision. *See Ring,* 122 S. Ct. at 588-89; *Hurst I,* 136 S. Ct. at 621. Despite this fact, defendants who correctly argued that *Apprendi* should be extended to penalty phase jury fact-finding between 2000 and 2002 are barred from seeking relief under *Hurst.*

The Eighth Amendment demands that the decision to impose or not impose the death penalty be based on an individualized sentencing determination that takes into account the circumstances of the offense and the character of the accused. *Gregg v. Georgia,* 96 S. Ct. 2909, 2932 (1976). However, to then make an arbitrary determination of which defendants will have their death sentences actually carried out based on impermissible factors defeats this constitutional guarantee. To determine who lives and who dies based on random procedural vagaries as shown in the cases cited above violates the constitutional guarantee against the whimsical and inconsistent application of the death penalty. In *Witt,*

this Court established a test that makes new rules applicable to all defendants on postconviction relief or none at all. The purpose of abridging the doctrine of finality is to ensure, particularly in cases involving the death penalty, that the law is applied uniformly. *See Witt,* 387 So. 2d at 925 ("A determination that a new principle of law should be *fully* retroactive" involves a balancing of the interests in fairness and uniformity with decisional finality). *Asay* does just the opposite.

The cut-off date also violates the Fourteenth Amendment's guarantee of due process and equal protection of the law. Even defendants who are in the class of persons whose convictions and death sentences were final prior to *Hurst* and are seeking relief on collateral attack are treated differently without any regard for the facts and circumstances of their respective cases, with some defendants being granted postconviction relief from their death sentences and others not. A classification must be reasonable and not arbitrary, resting upon some ground of difference that has a fair and substantial relation to the object, so that all persons similarly circumstanced shall be treated alike. *Eisenstadt v. Baird,* 92 S. Ct. 438, 447 (1972). Persons sentenced to death also have a protected liberty interest in the sentencing procedures required by state law. *Evitts v. Lucey,* 105 S. Ct. 830 (1985).

If *Hurst* Applies Retroactively, Dillbeck Has a Meritorious Claim

But for this Court's non-retroactivity holding in *Asay,* Dillbeck has an otherwise valid claim that his death sentence is unconstitutional. Dillbeck

established one statutory and several non-statutory mitigating factors at trial (R. 128). Dillbeck's jury only made a unanimous finding as to the existence of one aggravating factor (contemporaneous felony) out of the five that were relied upon to impose the death penalty. In addition, the jury's recommendation of death was by a vote of only eight to four (R. 132). On these facts, *Hurst* error is present and is not harmless beyond a reasonable doubt because it is impossible to conclude that all twelve jurors made the required findings.

Additional Arguments to be Raised and Briefed in this Appeal

This response is limited to the Court's order to show cause why this appeal should not be dismissed in light of the decision in *Hitchcock*, and is not the equivalent of an appellate brief or a substitute therefor. Dillbeck wishes to preserve for federal court review all arguments for the retroactive application of *Hurst* to his case, including those issues addressed in *Hitchcock*.

Dillbeck wishes to preserve for federal court review his claim that *Hurst I* and *Hurst II* meet the federal test for retroactivity under *Linkletter v. Walker*, 85 S. Ct. 1731 (1965), and *Stovall v. Denno,* 87 S. Ct. 1967 (1967), which would require the state courts to apply *Hurst* retroactively under the Supremacy Clause as stated in *Montgomery,* 136 S. Ct. at 731-32. This argument was briefed and rejected in *Hitchcock,* and therefore is not presented here as a basis for discharging the show cause order. However, nothing in this response should be construed as a waiver of

Dillbeck's federal retroactivity argument or any other argument that this Court's retroactivity ruling in *Asay* is arbitrary and contrary to federal law. In addition, this Court's ruling in *Hitchcock* is pending certiorari review in the U.S. Supreme Court in Case No. 17-6180 and could be reversed.

Conclusion

Based on the foregoing, Dillbeck requests that the Court discharge the order to show cause based on *Hitchcock v. State,* and allow this appeal to proceed with full briefing and oral argument.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing response was furnished by electronic service to the Office of the Attorney General at capapp@myfloridalegal.com on October 13, 2017.

/s/ Baya Harrison
Baya Harrison, III

EXHIBIT 5

In the Supreme Court of Florida

DONALD DAVID DILLBECK,

Appellant,

v.

CASE NO.: SC17-847
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

STATE'S REPLY TO ORDER TO SHOW CAUSE

On September 25, 2017, this Court issued an order to Appellant to show cause "why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445." Under this Court's decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017), Dillbeck is not entitled to any *Hurst* relief because his sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This Court has repeatedly rejected the same arguments opposing counsel presents in the response. In sum, *Asay* and *Hitchcock* control. This Court should once again follow its well-established precedent and affirm the trial court's summary denial of the successive postconviction motion.

Procedural history of the *Hurst* claim

Dillbeck's death sentence became final on March 20, 1995, when the United States Supreme Court denied his petition for writ of certiorari in the direct appeal. *Dillbeck v. Florida*, 514 U.S. 1022 (1995).

On April 11, 2016, Dillbeck, represented by registry counsel Baya Harrison, filed a second successive postconviction motion raising a Sixth Amendment right-to-a-jury-trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), in the state trial court. On January 23, 2017, Dillbeck filed an amended successive motion raising one claim based *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). The State filed an answer to the successive postconviction motion and an answer to the amended successive postconviction motion. The State, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Gaskin v. State*, 218 So.3d 399 (Fla. 2017), asserted that *Hurst II* did not apply to Dillbeck because his sentence was final years before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. The trial court held two case management conferences to hear the arguments of counsel. On April 11, 2017, the trial court summarily denied the successive postconviction motion citing *Asay* and *Gaskin*.

Dillbeck then appealed the denial of his successive postconviction *Hurst* motion to this Court. *Dillbeck v. State*, SC17-847. On September 25, 2017, this Court issued an order for Dillbeck to show cause why *Hitchcock* does not control. On October 13, 2017, Dillbeck filed his response. This is the State's reply to the response to the order to show cause.

Merits

Under this Court's well-established controlling precedent, *Hurst* is not retroactively applicable to Dillbeck because his death sentence became final in 1995. *Dillbeck v. Florida*, 514 U.S. 1022 (1995).

In *Asay v. State*, 210 So.3d 1, 11-22 (Fla. 2016), *cert. denied, Asay v. Florida*, 2017 WL 1807588 (Aug. 24, 2017), this Court held that any capital defendant whose death sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002 was not entitled to *Hurst* relief. This Court performed a full retroactivity analysis using the *Witt v. State*, 387 So.2d 922 (Fla. 1980), test in its *Asay* decision. *Asay*, 210 So.3d at 15-22.

This Court reaffirmed its holding in *Asay* in *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017). This Court in *Hitchcock* rejected several constitutional challenges to its non-retroactivity rule reaffirming its prior holding in *Asay*. Opposing counsel in his response to the order to show cause makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in *Hitchcock*, *Asay VI*, and *Lambrix*. *Hitchcock*, 2017 WL 3431500 at *2; *Asay v. Jones*, 2017 WL 3472836, *6 (Fla. Aug. 14, 2017) (*Asay VI*) (denying an Eighth Amendment challenge to the holding in *Asay*); *Lambrix v. State*, 2017 WL 4320637, *1-*2 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the

holding in *Asay* citing *Hitchcock* and *Asay VI*). This Court should again reject these various constitutional challenges for the same reasons.[1]

Moreover, this Court has explicitly followed *Asay* in a number of capital cases which are now final.[2] This Court recently affirmed that holding yet again in several cases including in two active death warrant cases. *Jones v. State*, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017) (denying *Hurst* relief citing *Asay*); *Asay v. State*, 2017 WL 3472836 (Fla. Aug. 14, 2017) (*Asay IV*) (same in active warrant); *Lambrix v. State*, 2017 WL 4320637 (Fla. Sept. 29, 2017) (same in active warrant). So, since December of 2016 and as recently as September of 2017, this Court has consistently followed *Asay*. This Court has repeatedly held in numerous capital cases including active warrant cases that *Hurst* does not apply retroactively to defendants like Dillbeck. *Asay* is firmly established precedent. *Asay* and *Hitchcock* control.

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[1] The Eleventh Circuit has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule established in *Asay* recently in *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205 (11th Cir. Oct. 5, 2017) (No. 17-14413), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017).

[2] *Bogle v. State*, 213 So.3d 833, 855 (Fla. 2017) (denying *Hurst* relief citing *Asay*); *Lambrix v. State*, 217 So.3d 977, 989 (Fla. March 9, 2017), *rehearing denied*, SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying *Hurst* relief citing *Asay*); *Lukehart v. Jones*, 2017 WL 1033691 (Fla. March 17, 2017) (denying *Hurst* relief citing *Asay*); *Oats v. Jones*, 2017 WL 2291288 (Fla. May 25, 2017) (denying *Hurst* relief citing *Asay*); *Rodriguez v. State*, 219 So.3d 751, 760 (Fla. April 20, 2017), *rehearing denied*, SC15-1795, 2017 WL 2598492 (Fla. June 15, 2017) (denying *Hurst* relief citing *Asay*).

Furthermore, this Court has also rejected arguments regarding the statutory retroactivity of Chapter 2017-1, Laws of Florida, in both *Asay IV* and *Lambrix*. *Asay*, 2017 WL 3472836 at *7 (rejecting a claim that Chapter 2017-1, Laws of Florida, creates a substantive and retroactive right to a life sentence unless a jury unanimously recommends a death sentence); *Lambrix*, 2017 WL 4320637 at *1 (same). Opposing counsel points to no language in the text of the statute that supports an argument that the Legislature intended to grant all capital defendants new penalty phases. There is no support in the legislative history of this chapter for a claim that the Legislature intended the new law to apply retroactively and require that all capital defendants on death row be resentenced. See Senate Staff Analysis dated Feb. 21, 2017, at 6-7. Additionally, the Eleventh Circuit has rejected the claim that federal constitutional law requires retroactive application of the new death penalty statute as well. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205, *9 (11th Cir. Oct. 5, 2017), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017).

While opposing counsel insists that *Hurst* is retroactive under federal law, it is not. The United States Supreme Court has held that *Ring* was not retroactive in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989)).[3] If a case is not retroactive

[3] Opposing counsel mistakenly invokes the old federal tests for retroactivity of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), as being the current federal test for retroactivity. While Florida continues to adhere to *Stovall/Linkletter* as part of the state test for retroactivity, the federal

under the broader state test for retroactivity of *Witt v. State*, 387 So.2d 922 (Fla. 1980), which this Court used in *Asay*, it is certainly not retroactive under the narrower federal test for retroactivity of *Teague*. *See Asay*, 210 So.3d at 15 (describing *Witt* as "more expansive" than *Teague* citing *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005)).

The Eleventh Circuit recently held that *Hurst* is not retroactive under federal law. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)), *cert. denied, Lambrix v. Jones*, 17-5153, 2017 WL 3008927 (Oct. 2, 2017); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017) (concluding this Court's holding in *Asay* to be "fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*"), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017). *Hurst II* is not retroactive under federal law according to the Eleventh Circuit.

Furthermore, the Supremacy Clause does not require states to adopt *Teague*. States are free to adopt their own broader retroactivity tests. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008); *Montgomery v. Louisiana*, 136 S.Ct. 718, 728-29 (2016) (explaining that, under *Danforth*, states are free to have broader,

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courts do not. *Hughes v. State*, 901 So.2d 837, 840 (Fla. 2005) (noting that *Witt* is based in part on factors from the old *Stovall/Linkletter* test). *Stovall* and *Linkletter* have been overruled. *Teague* is the current federal test for retroactivity.

but not narrower, retroactivity tests if a new substantive rule of constitutional law is involved). Opposing counsel is implicitly asserting that the Eleventh Circuit ignored the Supremacy Clause in *Lambrix*. It did not.

Contrary to opposing counsel's assertion, the United States Supreme Court in *Montgomery* did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at a couple of points in its discussion. *Id.*, 136 S.Ct. at 723, 728. If anything, the *Montgomery* Court reaffirmed *Summerlin*.

And *Ivan V. v. City of New York*, 407 U.S. 203 (1972), is irrelevant to any retroactivity analysis in Florida. If a rule of law it not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades.[4] Nor did *Hurst* truly involve the standard of proof. The issue in *Hurst v. Florida* was who decides — the judge versus the jury — not the standard of proof. Nor is the new unanimity

[4] *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt").

requirement established by this Court in *Hurst II* the equivalent of a standard of proof. They are two very different concepts. The "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well.[5]

Opposing counsel misreads *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). The Delaware Supreme Court in *Powell* distinguished Florida law as announced by this Court in *Hurst II* from Delaware law as announced in *Rauf v. State*, 145 A.3d 430 (Del. 2016), pointing out that Florida law did not involve a change in the standard of proof. *Powell*, 153 A.3d at 73-74 (stating that "unlike *Rauf*," *Hurst II* did not involve "a lower burden of proof"). Nor would the United States Supreme Court agree with the Delaware Supreme Court about a standard of proof applying to weighing, much less that *Teague* or *Ivan V.* mandates retroactive application of any such new standard.[6] While the Delaware Supreme Court is free to apply its

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[5] Opposing counsel refers to a footnote in *Hurst II* as creating a new standard of proof but that footnote reads:

> As we stated earlier, even if the jurors unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death. And, even if the jury unanimously recommends a death sentence, the trial court is never required to impose death.

Hurst II, 202 So.3d at 62, n.18. This footnote refers to a jury exercise of mercy and a judge's exercise of mercy, not any standard of proof.

[6] *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (expressing doubt whether it is even possible to apply a standard of proof to either mitigation or weighing and opining that weighing is "mostly a question of mercy," not a fact); *Kansas v.*

Rauf decision retroactively under state law under *Danforth*, the United States Supreme Court would never agree that federal constitutional law mandates that *Rauf* be applied retroactively. Such an argument is directly contrary to *Danforth* itself. *Powell*, a state case involving a change in Delaware law, certainly does not establish that federal constitutional law mandates the retroactivity of *Hurst II*, especially not in the face of United States Supreme Court precedent and Eleventh Circuit precedent to the contrary. *Hurst II* simply is not retroactive under federal law.

Opposing counsel asserts that *Hitchcock* does not control the two issues of 1) whether *Hurst II* created a substantive rule of law that must be applied retroactively under the logic of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016); and 2) the cut-off date of 2002 created in *Asay* is arbitrary in violation of the Eighth Amendment and equal protection.

The United States Supreme Court in *Montgomery* explained that the federal consitution requires that new substantive rules be applied retroactively. *Montgomery*, 136 S.Ct. at 728. The *Montgomery* Court then defined substantive

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Marsh, 548 U.S. 163, 175 (2006) (holding that a death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances because no particular "method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"); *Kansas v. Marsh*, 548 U.S. 163, 187, n.2 (2006) (Scalia, J., concurring) (observing that the federal Constitution does not require a reasonable doubt standard as to the weighing process). Because the United States Supreme Court does not even view weighing as a fact that is subject to any standard of proof, the High Court would never reach the issue of retroactivity under *Ivan V.*

as "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id*. The United States Supreme Court in *Summerlin*, a retroactivity case, defined substantive as a new rule that places "particular conduct or persons" "beyond the State's power to punish." *Summerlin*, 542 U.S. at 352.

But, according to the United States Supreme Court, the Sixth Amendment right to a jury trial is a procedural right, not a substantive right. The United States Supreme Court specifically observed in a retroactivity case that "*Ring*'s holding is properly classified as procedural" because the Sixth Amendment's jury-trial guarantee "has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353. The *Summerlin* Court explained that rules that allocate decisionmaking authority between the judge and the jury "are prototypical procedural rules." *Id*. The Supreme Court noted that they had classified the right to a jury trial as procedural "in numerous other contexts." *Id*. at 353-54 (citing numerous cases). While the opposing counsel may view the right to a jury trial as substantive, the United States Supreme Court has repeatedly classified it as procedural and in very similar situations. So, *Hurst* is not substantive under *Montgomery*.

Montgomery does not apply at all. And the state test for retroactivity of *Witt* does not employ the substantive/procedural distinction as a factor. Opposing counsel is really mixing and matching parts of the federal test for retroactivity

with the state test for retroactivity. He is tangling *Teague* with *Witt*. But the United States Supreme Court in *Danforth* held that states are not required to adopt the federal test for retroactivity. And, under the state test of *Witt*, this Court has already granted more capital defendants *Hurst* relief than they would have received under the federal test of *Teague*.

Regarding the cut-off date established in *Asay* violating fundamental fairness; or being arbitrary under the Eighth Amendment, or a violation of equal protection, this Court has rejected those same arguments in *Asay VI* and *Lambrix*. *Asay*, 2017 WL 3472836 at *6 (*Asay VI*); *Lambrix*, 2017 WL 4320637at *1-*2 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in *Asay* citing *Hitchcock* and *Asay VI*). Indeed, many of these same arguments were made by the dissenters in *Asay* itself but rejected by the majority.[7] The majority in *Asay* drew the cut-off in full awareness of these constitutional attacks.

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[7] *Asay*, 210 So.3d at 31 (Lewis, J., concurring) ("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" and characterizing the majority's cut-off date based on *Ring* as being "arbitrary"); *Asay*, 210 So.3d at 35-35 (Pariente, J., dissenting) (stating that *Hurst II* is that "rare situation in which finality yields to fundamental fairness" and that the majority's rule results in "arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced" and taking the view that to "avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing," "*Hurst* should be applied retroactively to all death sentences"); *Asay*, 210 So.3d at 37 (Perry, J., dissenting) ("the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons").

As to fundamental fairness, due process does not require courts abandon all retroactivity analysis and apply all new rules to all cases. Such an argument negates all finality in the criminal law and it is finality that is the overriding concern in any retroactivity analysis including in capital cases. *Penry v. Lynaugh*, 492 U.S. 302 (1989). As the *Penry* Court observed, the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314.

Furthermore, both federal and state courts have retroactivity doctrines that depend on dates. For example, a cut-off date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *See also Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). *Griffith* depends on the date of finality of the direct appeal. The current federal test for retroactivity, *Teague v. Lane*, 489 U.S. 288 (1989), also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the exception to *Teague* applies. The date of finality is the critical date-based toogle under *Teague*.

Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development

in the law and older final cases that will not receive benefit of the new development is part and parcel of the landscape of retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. Neither *Asay* nor *Griffith* nor *Teague* violates due process. Retroactivity analysis itself is not fundamentally unfair in violation of due process.

As to Equal Protection, it is doubtful that Equal Protection analysis even applies to judicial decisions, such as *Asay*, as opposed to statutes. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (using due process, not equal protection, when a judicial decision is at issue). But even assuming it does, such an argument makes little jurisprudential sense. A cut-off date does not create a protected class and there is no fundamental right involved. The date of the finality of a defendant's sentence is not an immutable characteristic requiring application of strict scrutiny or intermediate scrutiny.[8] The only possible standard of review under equal protection principles, would be rational basis review. And the cut-off date of *Ring* established by this Court in *Asay* more than satisfies rational basis review. Again, all retroactivity analysis depends on cut-off dates. According to

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[8] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (giving race, alienage, or national origin as examples of classifications that are subjected to strict scrutiny); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding gender was a classification subject to heightened but not strict scrutiny under equal protection); *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938) (stating that more searching judicial inquiry may be required when dealing with "discrete and insular minorities").

opposing counsel's logic, all retroactivity tests violate equal protection. The Equal Protection Clause does not mandate that every major change in the law be applied retroactively, which would be the necessary outcome of adopting this view. Neither *Asay* nor *Griffith* nor *Teague* violates equal protection either.

In sum, *Asay V*, *Hitchcock*, *Asay VI*, and *Lambrix* control.

Accordingly, this Court should affirm the trial court's denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S REPLY TO ORDER TO SHOW CAUSE has been furnished by electronic mail via e-portal to Baya Harrison III, P.O. Box 102, Monticello, FL 32345; phone: (850) 997-5554; email: bayalaw@aol.com this 17th day of October, 2017.

/s/ *Charmaine M. Millsaps*
Charmaine M. Millsaps
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EXHIBIT 6

IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v. Case No. SC17-847

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY TO STATE'S REPLY TO ORDER TO SHOW CAUSE

COMES NOW the Appellant, Donald Dillbeck, through undersigned counsel, and files this reply to the "State's Reply to Order to Show Cause" (hereinafter "State's Reply") filed October 17, 2017.

Reply Argument

The State makes several mischaracterizations of Dillbeck's arguments, asserting that they are "the same arguments" that this Court has rejected in other cases (State's Reply, p. 1), that Dillbeck "makes many of the same Eighth Amendment … arguments that this Court explicitly rejected in *Hitchcock, Asay VI,* and *Lambrix* (State's Reply, p. 3), and an incorrect claim that Dillbeck asserted in his response to the order to show cause that *Schriro v. Summerlin* was overruled in *Montgomery v. Louisiana* (State's Reply, p. 7). None of these statements is

accurate, nor does the State's Reply cite to any pleading or opinion to support these assertions. Decisions in cases other than *Hitchcock* are irrelevant to the present show cause order, and Dillbeck's case presents issues not raised or decided in *Hitchcock.*

Dillbeck's first argument is that this Court announced a substantive rule of law in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), when it held that the Eighth Amendment requires the jury to render a unanimous verdict as to all factual findings and the ultimate recommendation of death during capital sentencing proceedings. The State's Reply doesn't even address this argument, ignoring it completely. Instead, the State argues that the Sixth Amendment right to trial by jury is procedural (State's Reply, p. 10).

Dillbeck conceded that in *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004), the Supreme Court held that the Sixth Amendment right announced in *Ring v. Arizona* was not retroactive (Dillbeck's Response, p. 6). Rather than assert that this ruling was overruled by *Montgomery*, Dillbeck asserted that the Eighth Amendment right to a unanimous verdict as to all jury findings required by § 921.141 is substantive in nature and requires a retroactivity analysis separate from the *Witt* analysis applied to the purely procedural rule announced in *Hurst v. Florida,* 136 S. Ct. 616 (2016).

The ruling in *Hurst v. Florida* derived from *Ring* and was based solely on

the Sixth Amendment right to trial by jury in capital sentencing announced in *Ring.* However, the ruling in *Hurst v. State* is based in part on the Eighth Amendment. As such, the retroactivity of that rule is not governed by *Summerlin.*

The State offers no explanation for why a rule announcing a unanimous verdict requirement in capital sentencing is not a new substantive rule. This Court's stated reason for requiring juror unanimity was "to help narrow the class of murderers subject to capital punishment." *Hurst II,* 202 So. 3d at 60 (citing *McCleskey v. Kemp,* 107 S. Ct. 1756 (1987)). This narrowing function discussed in *McCleskey* derives from the Eighth Amendment prohibition on arbitrary imposition of the death penalty. Contrary to the State's argument, this goes beyond merely shifting the role of fact-finder from judge to jury, an issue expressly avoided in *McCleskey. See Id* at 303 n.25. The Sixth Amendment right to trial by jury and the Eighth Amendment right to individualized sentencing are not the same and do not overlap, and a retroactivity ruling as to one right has no bearing on the other.

Dillbeck's second argument is that *Hurst v. State* assigned a burden of proof of beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient for death, a standard which did not previously apply to that finding and which is substantive in nature. The State argues that *Ivan V. v. City of New York* and other decisions regarding substantive rules of law do not apply because *Hurst*

did not announce a new rule. The State reasons that, "Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades." (State's Reply, p. 7).

That is true as to the existence of one or more aggravating factors. However, prior to *Hurst v. State,* the State was not required to prove beyond a reasonable doubt that the aggravating factors were sufficient for death. It is now.

In support of his position, Dillbeck cited to two decisions by the Delaware Supreme Court that applied the standard of proof beyond a reasonable doubt to a jury's findings in a capital sentencing proceeding and then applied that rule retroactively. In reply, the State attempts to distinguish *Powell v. Delaware,* 153 A. 3d 69 (Del. 2016), which held that the rule in *Rauf v. State,* 145 A. 3d 430 (Del. 2016), is retroactive. The State's argument is that *Rauf* remedied the prior unconstitutional use of a lower burden of proof while *Hurst* did not, and therefore *Powell* does not support Dillbeck's argument that *Hurst v. State* should be applied retroactively (State's Reply, p. 8). The State is incorrect because it is conflating the rule announced in *Hurst v. Florida* with this Court's holding in *Hurst v. State.*

The State is misconstruing the following language from the *Powell* opinion:

> *Ring* only implicated the Sixth Amendment right to a jury. The same was true in *Hurst* because Florida also already required proof beyond a reasonable doubt.

Powell, 153 A. 3d at 73-74. When *Powell* stated that *"Hurst"* only implicated the Sixth Amendment right to a jury, it was referring to *Hurst v. Florida.* The hyperlink in the opinion takes the reader to the U.S. Supreme Court's opinion in *Hurst v. Florida.* Thus, the Delaware Supreme Court was distinguishing the due process claim before it from the Sixth Amendment issue resolved in *Hurst v. Florida,* and was not distinguishing the Eighth Amendment and burden of proof issues decided in *Hurst v. State.*

Furthermore, the fact that Florida "already required proof beyond a reasonable doubt" prior to *Hurst* only referred to the findings as to the existence of one or more aggravating factors, not to the other findings required by § 921.141. Powell quotes the following language from *Hurst v. State* that illustrates this point:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. These same requirements existed in Florida law when Hurst was sentenced in 2012-although they were consigned to the trial judge to make.

Hurst v. State, 202 So. 3d at 53 (italics omitted).

Thus, prior to the *Hurst* decisions, the State was required to prove the existence of one or more aggravating factors beyond a reasonable doubt, and was required to prove that the aggravating factors were sufficient. However, the State

was not required to prove the sufficiency of the aggravators beyond a reasonable doubt until this Court added that requirement in *Hurst v. State.*

In footnote 18 of its opinion in *Hurst v. State,* this Court stated that, "even if the jurors unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death." *Hurst v. State,* 202 So. 3d at 62 n.18 (emphasis added). The Court combined the findings as to the existence and the sufficiency of the aggravators in a single phrase and assigned a burden of proof beyond a reasonable doubt and then, separated by a comma, referenced the finding that the aggravators outweigh the mitigators. Dillbeck argued that this language indicated that the sufficiency finding is also subject to the standard of proof beyond a reasonable doubt, which is analogous to the holdings in *Rauf* and *Powell.*[1] If so, this requirement did not exist prior to the decision in *Hurst v. State.*

Requiring the State to prove sufficiency beyond a reasonable doubt is also consistent with the Due Process Clause, which demands that the State prove every

[1] The State offers no argument for why the finding of sufficiency should not be subject to the standard of proof beyond a reasonable doubt, nor any authority establishing that this requirement existed prior to the decision in *Hurst v. State.* However, in light of this Court's stated desire to insulate Florida's capital sentencing scheme from further constitutional challenges in the future, it would be anomalous not to include this constitutional guarantee. *See Hurst v. State,* 202 So. 3d at 62 (Stating, "[t]his requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.[18]")

necessary element of an offense beyond a reasonable doubt. In *Hurst v. State,* this Court stated:

> The Supreme Court made clear [in *Hurst v. Florida*], as it had in *Apprendi,*[2] 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 v. State, 202 So. 3d at 51 (emphasis added). This Court then analyzed § 921.141 and concluded that "every fact, and thus every element, necessary for the imposition of the death penalty" includes a finding that the aggravating factors are "sufficient to impose death." *Id* at 52-53.

If the finding of sufficiency is an element, it must be proven beyond a reasonable doubt to comport with Due Process and *Apprendi.* The fact that this Court characterized the sufficiency finding as an element within the meaning of *Apprendi* supports Dillbeck's interpretation of footnote 18 that the standard of proof beyond a reasonable doubt now applies to that finding.

Therefore, while it is true that the ruling in *Rauf* was partly decided on due process grounds because the finding that the aggravating factors outweigh the mitigating factors was previously subject to the preponderance of the evidence standard and the court increased it to proof beyond a reasonable doubt[3], that does

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[2] *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000)

[3] *See Powell,* 153 A. 3d at 74 (noting that failure to require proof beyond a reasonable doubt was a Due Process Clause violation).

not distinguish *Powell* from this Court's holding in *Hurst v. State*. Both decisions involve the assignment of a burden of proof beyond a reasonable doubt to a critical finding, or element, necessary for imposition of the death penalty under state law. Therefore, the decisions in *Rauf* and *Powell* are persuasive authority on the question of whether allocation of the burden of proof beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient for death (1) is required by the Due Process Clause, and (2) is a substantive rule that should be applied retroactively.

This Court cited to *Rauf* and *Powell* in *Hurst v. State,* acknowledging that Florida and Delaware were two of only three states that did not require a unanimous jury recommendation of death in capital sentencing prior to *Hurst v. Florida. See Hurst v. State,* 202 So. 3d at 61 n.17. The Court expressed a desire to bring Florida's capital sentencing laws "into harmony with the direction of society reflected in all these states and with federal law." *Id* at 61. Delaware has already done so. Requiring juror unanimity and assigning a burden of proof beyond a reasonable doubt to all critical findings necessary for imposition of the death penalty, including the finding of sufficiency required by § 921.141, are both steps toward accomplishing that "important goal." *Id.* However, both constitute new substantive rules that may qualify for retroactive application irrespective of the

Sixth Amendment jury trial right announced in *Hurst v. Florida.* This question was not addressed or resolved in *Hitchcock.*

Conclusion

Based on the foregoing, Dillbeck requests that the Court discharge the order to show cause and allow this appeal to proceed.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing response was furnished by electronic service to Charmaine Millsaps, Senior Assistant Attorney General, at capapp@myfloridalegal.com on November 6, 2017.

/s/ Baya Harrison
Baya Harrison, III

EXHIBIT 7

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: May 15, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

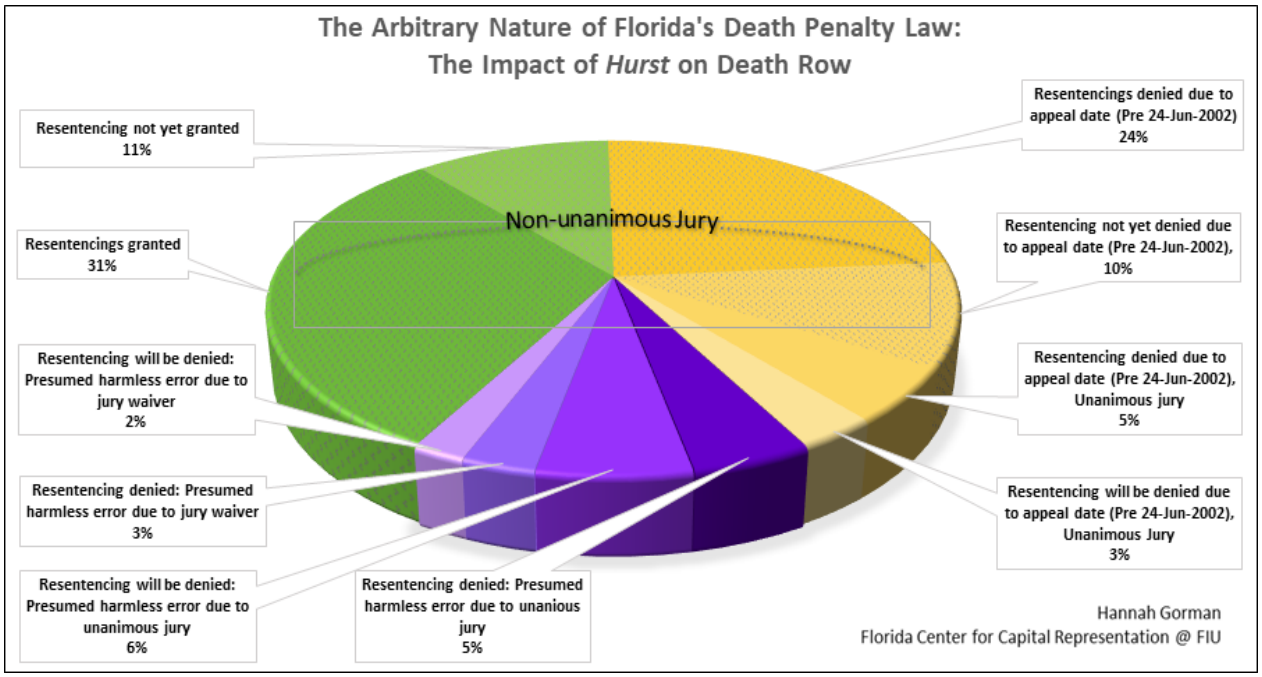
The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Non-unanimous Jury
Resentencings granted
31%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing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

EXHIBIT 8

1. *Alston v. State*, Nos. SC17-499, SC17-983, 2018 WL 2251331 (Fla. May 17, 2018)
2. *Bates v. State*, 238 So. 3d 98 (Fla. 2018)
3. *Bradley v. Jones*, 238 So. 3d 95 (Fla. 2018)
4. *Branch v. State*, 234 So. 3d 548 (Fla. 2018)
5. *Jones v. State*, No. 234 So. 3d 545 (Fla. 2018)
6. *Peterka v. State*, 237 So. 3d 903 (Fla. 2018)
7. *Phillips v. State*, 234 So. 3d 547 (Fla. 2018)
8. *Stephens v. State*, 238 So. 3d 94 (Fla. 2018)
9. *Suggs v. State*, 234 So. 3d 546 (Fla. 2018)
10. *Walls v. State*, 238 So. 3d 96 (Fla. 2018)
11. *Atwater v. State*, 234 So. 3d 550 (Fla. 2018)
12. *Beasley v. State*, 234 So. 3d 553 (Fla. 2018)
13. *Burns v. State*, 234 So. 3d 555 (Fla. 2018)
14. *Clark v. State*, 238 So. 3d 99 (Fla. 2018)
15. *Cole v. State*, 234 So. 3d 644 (Fla. 2018)
16. *Ford v. State*, 237 So. 3d 904 (Fla. 2018)
17. *Puiatti v. State*, 234 So. 3d 551 (Fla. 2018)
18. *Rhodes v. State*, 234 So. 3d 554 (Fla. 2018)
19. *Willacy v. State*, 238 So. 3d 100 (Fla. 2018)
20. *Windom v. State*, 234 So. 3d 556 (Fla. 2018)
21. *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018)
22. *Evans v. State*, No. SC17-869, 2018 WL 524796 (Fla. 2018)
23. *Jackson v. State*, 237 So. 3d 905 (Fla. 2018)

24. *Kokal v. State*, 237 So. 3d 907 (Fla. 2018)

25. *Lucas v. State*, 234 So. 3d 647 (Fla. 2018)

26. *Marquard v. State*, 234 So. 3d 560 (Fla. Jan. 24, 2018)

27. *Sweet v. State*, 234 So. 3d 646 (Fla. 2018)

28. *Taylor v. State*, 234 So. 3d 649 (Fla. 2018)

29. *Thomas v. State*, 234 So. 3d 559 (Fla. 2018)

30. *Trease v. State*, No. SC17-686, 2018 WL 1959603 (Fla. Apr. 26, 2018)

31. *Anderson v. State*, 235 So. 3d 277 (Fla. 2018)

32. *Finney v. State*, 235 So. 3d 279 (Fla. 2018)

33. *Hartley v. State*, 237 So. 3d 908 (Fla. 2018)

34. *Jeffries v. State*, 235 So. 3d 283 (Fla. 2018)

35. *Kelley v. State*, 235 So. 3d 280 (Fla. 2018)

36. *Lightbourne v. State*, 235 So. 3d 285 (Fla. 2018)

37. *Morris v. State*, 236 So. 3d 324 (Fla. 2018)

38. *Stewart v. State*, 235 So. 3d 798 (Fla. 2018)

39. *Trepal v. State*, 235 So. 3d 281 (Fla. 2018)

40. *Trotter v. State*, 235 So. 3d 284 (Fla. 2018)

41. *Bell v. State*, 235 So. 3d 287 (Fla. 2018)

42. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018)

43. *Brown v. State*, 235 So. 3d 289 (Fla. 2018)

44. *Davis v. State*, 235 So. 3d 295 (Fla. 2018)

45. *Foster v. State*, 235 So. 3d 290 (Fla. 2018)

46. *Foster v. State*, 235 So. 3d 294 (Fla. 2018)

47. *Fotopoulos v. State*, 237 So. 3d 911 (Fla. 2018)

48. *Gamble v. State*, 235 So. 3d 288 (Fla. 2018)

49. *Jennings v. State*, 237 So. 3d 909 (Fla. 2018)

50. *Long v. State*, 235 So. 3d 293 (Fla. 2018)

51. *Booker v. Jones*, 235 So. 3d 298 (Fla. 2018)

52. *Davis v. Jones*, No. 235 So. 3d 301 (Fla. 2018)

53. *Gudinas v. State*, 235 So. 3d 303 (Fla. 2018)

54. *Lamarca v. State*, 237 So. 3d 914 (Fla. 2018)

55. *Mendoza v. State*, 235 So. 3d 302 (Fla. 2018)

56. *Occhicone v. State*, 235 So. 3d 299 (Fla. 2018)

57. *Pace v. State*, 237 So. 3d 912 (Fla. 2018)

58. *Rogers v. State*, 235 So. 3d 306 (Fla. 2018)

59. *Sochor v. State*, 235 So. 3d 304 (Fla. 2018)

60. *Whitfield v. State*, 235 So. 3d 297 (Fla. 2018)

61. *Consalvo v. State*, 235 So. 3d 307 (Fla. 2018)

62. *Gordon v. State*, 235 So. 3d 311 (Fla. 2018)

63. *Krawczuk v. State*, 237 So. 3d 915 (Fla. 2018)

64. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018)

65. *Nelson v. State*, 235 So. 3d 308 (Fla. 2018)

66. *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018)

67. *Sireci v. State*, 237 So. 3d 916 (Fla. 2018)

68. *Sliney v. State*, 235 So. 3d 310 (Fla. 2018)

69. *Stein v. State*, 237 So. 3d 919 (Fla. 2018)

70. *Whitton v. State*, 238 So. 3d 724 (Fla. 2018)

71. *Damren v. State*, 236 So. 3d 230 (Fla. 2018)

72. *Derrick v. State*, 236 So. 3d 231 (Fla. 2018)

73. *Griffin v. State*, 236 So. 3d 237 (Fla. 2018)

74. *Hodges v. State*, 236 So. 3d 241 (Fla. 2018)

75. *Johnson v. State*, 236 So. 3d 232 (Fla. 2018)

76. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018)

77. *Melton v. State*, 236 So. 3d 234 (Fla. 2018)

78. *Morton v. State*, 236 So. 3d 242 (Fla. 2018)

79. *Overton v. State*, 236 So. 3d 238 (Fla. 2018)

80. *Pietri v. State*, 236 So. 3d 235 (Fla. 2018)