No. _____

IN THE

Supreme Court of the United States

DONALD BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

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PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

Supreme Court of Florida

No. SC17-1219

DONALD BRADLEY,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 22, 2018]

PER CURIAM.

Donald Bradley petitions this Court for a writ of habeas corpus seeking 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 has jurisdiction. See art. V, § 3(b)(9), Fla. Const.

This Court stayed Bradley's case pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), 138 S. Ct. 513 (2017). After this Court decided Hitchcock, Bradley responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Bradley's response to the order to show cause, as well as the State's arguments in reply, we conclude that Bradley is not entitled to relief. Bradley was sentenced to death following a jury's recommendation for death by a vote of ten to two. Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001). Bradley's sentence of death became final in 2001. Bradley v. Florida, 534 U.S. 1048 (2001). Thus, Hurst does not apply retroactively to Bradley's sentence. See Hitchcock, 226 So. 3d at 217. Accordingly, we deny Bradley's petition.

The Court having carefully considered all arguments raised by Bradley, 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 Original Proceeding – Habeas Corpus, Clay County, Case No. 101996CF001277XXAXMX

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EXHIBIT 2

No. SC17-___

IN THE

Supreme Court of Florida

DONALD LEE BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Petitioner Donald Lee Bradley's death sentence became final after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). His petition asks the Court to review his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Those decisions should be applied to this post-*Apprendi* case under this Court's retroactivity standards as well as under the standards of federal retroactivity law.

Although this Court has already made clear that the *Hurst* decisions apply retroactively to death sentences that became final after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court has not yet provided an opinion specifically discussing *Hurst* retroactivity for the small number of death sentences that became final during the two-year period between *Apprendi* and *Ring*. The same *Hurst* retroactivity analysis that this Court has extended to all post-*Ring* death sentences should extend to post-*Apprendi* death sentences, including Petitioner's, because *Apprendi* is the constitutional basis for *Ring* and for the *Hurst* decisions.

There are 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver. Here, the *Hurst* error is not harmless since the advisory jury recommended a death sentence by a vote of 10 to 2. Petitioner requests that this Court grant a writ of habeas corpus under the *Hurst* decisions, vacate his death sentence, and remand for a new penalty phase.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9), of the Florida Constitution. This proceeding is also authorized by Florida Rule of Appellate Procedure 9.030(a)(3). This petition complies with Rule 9.100(a) requirements.

REQUEST FOR ORAL ARGUMENT

This petition presents important retroactivity arguments based on the "post-*Apprendi*" posture of this case. Petitioner respectfully requests oral argument.

REQUEST THAT THIS HABEAS CORPUS ACTION NOT BE STAYED PENDING THE DECISION IN *HITCHCOCK*

The *Apprendi* retroactivity arguments presented by this habeas corpus petition are not briefed in the pending appeal in *Hitchcock*, No. SC17-445. Petitioner urges the Court to independently evaluate this post-*Apprendi* petition, address the important issues concerning post-*Apprendi* retroactivity it raises, and not stay these habeas proceedings pending the decision in *Hitchcock*.

BACKGROUND

In 1998, Petitioner was convicted of murder in the Circuit Court of the Fourth Judicial Circuit, in and for Clay County. *See Bradley v. State*, 787 So. 2d 732, 736 (Fla. 2001). The jury returned a generalized advisory recommendation to impose the death penalty by a vote of 10 to 2.

The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court, not the jury, specifically found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the offense was heinous, atrocious, or cruel; (2) the offense was committed in a cold, calculated, and premeditated manner; (3) the offense was committed for pecuniary gain; and (4) the offense was committed while engaged in the commission of a burglary. *See Bradley v. State*, 33 So. 3d 664, 670 n.4 (Fla. 2010). The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the aggravators were not outweighed by the mitigation.[1] Based upon the court's own fact-finding, the court sentenced Petitioner to death. *See Bradley*, 787 So. 2d at 738.

During the pendency of Petitioner's direct appeal, the United States Supreme Court decided *Apprendi* on June 26, 2000, but this Court thereafter affirmed Petitioner's death sentence on March 1, 2001. *See id.* at 734. Petitioner's sentence became "final" on November 26, 2001, when the United States Supreme Court

[1] The mitigation the trial court found included: (1) Petitioner had no significant history of prior criminal activity; (2) Petitioner's age at the time of the crime; (3) Petitioner overcame a chaotic childhood and dysfunctional family life to make real achievements in his own life, including establishing loving relationships in his family and reestablishing a relationship with his father; (4) Petitioner had been a good provider and father for his present wife and his children; (5) Petitioner loved his family and was loved by them; (6) Petitioner maintained a good employment record; (7) Petitioner was helpful to other people inside and outside his family; and (8) Petitioner showed sincere religious faith. *See id.*

denied his petition for a writ of certiorari. *Bradley v. Florida*, 534 U.S. 1048 (2001); *see also* Fla. R. Crim. P. 3.851(d)(1)(B) (providing that a Florida conviction and sentence becomes final on direct appeal upon the United States Supreme Court's disposition of a petition for a writ of certiorari). Seven months later, the United States Supreme Court decided *Ring*.

This Court subsequently affirmed the denial of Petitioner's initial Florida Rule of Criminal Procedure 3.851 motion for post-conviction relief and denied his accompanying petition for a writ of habeas corpus. *Bradley*, 33 So. 3d at 667. Petitioner's Rule 3.851 motion argued, among other things, that Florida's capital sentencing scheme was unconstitutional under *Apprendi* and *Ring*. *Id.* at 670 n.6.

Petitioner sought a federal writ of habeas corpus under 28 U.S.C. § 2254, which was denied by the United States District Court for the Middle District of Florida in 2014. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 3:10-cv-1078, ECF No. 15 (M.D. Fla. Mar. 12, 2014). The United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 14-11630 (11th Cir. Sept. 12, 2014).

ARGUMENT

I. Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*

Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact necessary to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Florida's unconstitutional scheme, however, had an advisory jury to render a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that the jury, not the judge, must make the findings of fact required to impose the death penalty. *Id.*

In *Hurst v. State*, this Court explained that the Eighth Amendment also requires *unanimous* jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty,

and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[2] Each of those determinations are "elements" that must be found by a jury unanimously and beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

[2] This unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death may be imposed only upon unanimous jury verdicts.

Petitioner's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered a non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation. However, the record is clear that Petitioner's jurors were *not* unanimous as to whether the death penalty should even be recommended to the court.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments.

II. The *Hurst* decisions should apply retroactively to Petitioner under Florida's *Witt* retroactivity doctrine because his sentence became final after *Apprendi* was decided

The *Hurst* decisions should apply retroactively to Petitioner under the Florida retroactivity doctrine established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and this Court's post-*Hurst* retroactivity decisions. Petitioner's death sentence became final on November 26, 2001, after *Apprendi* was decided.

Under *Witt*, this Court applies changes in the law retroactively where those changes (1) emanate from either this Court or the United States Supreme Court; (2) are constitutional in nature; and (3) constitute developments of fundamental significance. *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015). For purposes of the third *Witt* prong, this Court decides whether developments in the law are of "fundamental significance" by analyzing three factors—purpose, reliance, and administration of justice—which *Witt* borrowed from the decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Falcon*, 162 So. 3d at 961.

This Court has already made clear that under a *Witt* analysis the *Hurst* decisions apply retroactively to all death sentences that became final after the 2002 decision in *Ring*. *See. e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has not yet squarely addressed *Hurst* retroactivity with respect to the small number of death sentences that became final during the two-year gap between *Apprendi* and *Ring*. This petition provides the Court with the opportunity to close the *Apprendi* gap by holding that the same *Hurst* retroactivity this Court has extended to post-*Ring* sentences should also extend to post-*Apprendi* sentences. *Apprendi* is the indispensable constitutional foundation for *Ring* and for the *Hurst* decisions, and extending *Hurst* retroactivity to post-*Apprendi* sentences satisfies all three prongs of a *Witt* analysis.

A. If Florida is to maintain a bright-line retroactivity rule for *Hurst* claims, the line should be drawn at *Apprendi* rather than *Ring* because both *Ring* and *Hurst* were extensions of *Apprendi*

If there is to be a bright-line retroactivity rule for *Hurst* claims, that line should be drawn at *Apprendi*, not *Ring*: *Ring* and *Hurst* both are merely extensions of the rule originally announced in *Apprendi*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the United States Supreme Court stated in *Hurst*, the *Ring* Court *applied Apprendi*'s *analysis* to conclude that Mr. Ring's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. Then, just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst v. Florida* applied *Apprendi*'s principles to Florida's capital sentencing scheme.

In *Hurst*, the Supreme Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was merely an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—the *Hurst* Court stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s similar overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639

(1990)—which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holding derived directly from *Apprendi*.

This Court has also consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived directly from *Apprendi*. Even in *Mosley v. State*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*."). And this was not a new observation: over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. For example, in *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005), the Court explained: "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was 'an evolutionary refinement in capital jurisprudence,' in that "[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*."

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the United States Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).

This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: that the United States Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So. 2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the United States Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the United States Supreme Court and citing *Mills*), *and King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same). In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would be arbitrary and fundamentally unfair to extend *Hurst* retroactivity to fourteen years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*.[3]

[3] The arbitrariness is particularly stark when we compare individual cases. For example, during the period between *Apprendi* and *Ring*, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, finding that *Hurst* was retroactive because his sentence became final after *Ring*. *See Card v. Jones*, SC17-453, 2017 WL 1743835 (Fla. May 4, 2017). However, Mr. Bowles, whose case was decided on direct appeal on the same day, might not obtain review under *Hurst* notwithstanding the post-*Apprendi* posture of his case.

B. Extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* and before *Ring* is supported by the three *Witt* factors

For the very same reasons this Court described in *Mosley v. State* with respect to post-*Ring* death sentences, extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* is also proper under the *Witt* doctrine. As noted above, retroactivity under *Witt* requires analysis of three prongs, all of which are satisfied with respect to post-*Apprendi* death sentences.

In both *Mosley* and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court observed that there is no dispute that *Hurst* claims satisfy the first two *Witt* retroactivity prongs because they (1) arise from decisions of this Court and the United States Supreme Court, and (2) are constitutional in nature. However, with respect to the third *Witt* prong—whether the *Hurst* decisions are of "fundamental significance," as measured by the three *Stovall*/*Linkletter* factors (purpose, reliance, and administration of justice)—*Mosley* and *Asay* held that retroactivity analysis depends on the date an individual's death sentence became final on direct appeal. In *Mosley*, the Court analyzed the third *Witt* prong in light of a death sentence that became final after both *Apprendi* and *Ring*, and concluded that the *Hurst* decisions applied retroactively. In *Asay*, the Court analyzed the third *Witt* prong in light of a death sentence that became final before both *Apprendi* and *Ring*, and concluded that *Hurst v. Florida* did not apply retroactively.

This Court has not yet published an opinion specifically analyzing the third *Witt* prong in the context of a death sentence, like Petitioner's, that became final between *Apprendi* and *Ring*. As applied to Petitioner's post-*Apprendi* sentence, the *Hurst* decisions are of "fundamental significance" within the meaning of the third *Witt* prong and the three *Stovall*/*Linkletter* factors. All three *Stovall*/*Linkletter* factors favor retroactivity.

1. Purpose of new rule

As applied to Petitioner's post-*Apprendi* death sentence, the first *Stovall*/*Linkletter* factor—the purpose of *Hurst v. Florida* and *Hurst v. State*—weighs at least "in favor" of retroactivity, if not "heavily in favor." In *Asay*, which analyzed only *Hurst v. Florida*, this Court stated that the purpose of the United States Supreme Court's Sixth Amendment decision "is to ensure that a criminal defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury." *Asay*, 210 So. 3d at 17. In *Mosley*, where this Court considered both *Hurst v. Florida* and the decision on remand in *Hurst v. State*, the Court added that the purpose of *Hurst v. State* was to enshrine Florida's "longstanding history requiring unanimous jury verdicts as to the elements of a crime" into the state's capital sentencing scheme. *Mosley*, 209 So. 3d at 1278. With those principles in mind, the *Asay* Court ruled in the context of a death sentence that became final nearly

a decade before both *Ring* and *Apprendi* that the purpose of *Hurst v. Florida* weighs "in favor" of retroactive application. *Asay*, 210 So. 3d at 18. In *Mosley*, in the context of a death sentence that became final after *Ring*, this Court concluded that the combined purpose of *Hurst v. Florida* and *Hurst v. State* weighed "heavily in favor" of retroactive application. *Mosley*, 209 So. 3d at 1248.

Here, under the reasoning of both *Mosley* and *Asay*, Petitioner's post-*Apprendi* death sentence weighs at least in favor of retroactive application, if not heavily in favor, given the closeness of his sentence's finality to the date *Ring* was decided. As this Court emphasized in *Asay*, the right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 210 So. 3d at 18 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life"). Or as the Court further noted in *Mosley*, there is a "critical importance of a unanimous jury verdict within Florida's independent constitutional right to a trial by jury." *Mosley*, 209 So. 3d at 1278. Given those critical features of the *Hurst* decisions, this Court should find that Petitioner's post-*Apprendi* sentence satisfies the "purpose" factor.

2. Extent of reliance on old rule

As applied to Petitioner's post-*Apprendi* death sentence, the second *Stovall*/*Linkletter* factor—the extent of reliance on Florida's unconstitutional pre-*Hurst* scheme—also weighs in favor of applying those decisions retroactively. This factor focuses on reliance on the idea that *Apprendi* did not apply to Florida's capital sentencing scheme. After *Apprendi*, Florida could no longer rely on the soundness of pre-*Apprendi* law, namely *Spaziano* and *Hildwin*, as that law was "irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623. As this Court explained in *Mosley*, the question is not whether Florida relied upon pre-*Apprendi* in good faith, but how *Hurst* and its antecedents changed the calculus of the constitutionality of Florida's capital sentencing scheme. *See Mosley*, 209 So. 3d at 1280. Thus, because *Apprendi* changed the calculus of Florida's capital scheme, this factor weighs in favor of applying retroactivity to post-*Apprendi* petitioners.

This Court concluded in *Asay* that reliance on the old rule weighed against retroactivity for a pre-*Apprendi* and pre-*Ring* petitioner because Florida had relied on the old rule for decades and 400 death row inmates had been sentenced under that rule. *Asay*, 210 So. 3d at 20. The Court reasoned that as of 1991 (a decade before *Apprendi*) "this Court and the State of Florida had every reason to believe that its

capital sentencing scheme was constitutionally sound." *Asay*, 210 So. 3d at 19.[4] *But the same is not true after Apprendi*.

The reliance factor therefore applies in a substantially different way for a prisoner whose sentence became final after *Apprendi*. Indeed, in his *Apprendi* concurrence, Justice Thomas plainly informed everyone that schemes like Florida's were on constitutionally uncertain ground and that the Supreme Court would be directly addressing those death penalty schemes in another case. *See Apprendi*, 530 U.S. at 523 (Thomas, J., concurring). From the day the opinion in *Apprendi* was issued, America's few judge-sentencing capital schemes (such as Florida's) were on a collision course with the Sixth Amendment.

Indeed, this Court's own decisions shifted after *Apprendi*, highlighting that the reliance factor favors retroactive application of the *Hurst* decisions to Petitioner. To be sure, it was after *Apprendi* that Justices of this Court recognized the shift and began acting on the basis of that recognition. For example, this Court began monitoring post-*Apprendi* appeals of death row inmates in other states. *See Mills*, 786 So. 2d at 537 (describing a Delaware petitioner's unsuccessful attempt to bring an *Apprendi* claim). And even more: in *Mills*, this Court rejected the application of

[4] Perhaps because of its context (review of a death sentence finalized in 1991), *Asay* did not discuss *Mills v. Moore*, the case where this Court, pre-*Ring*, considered the constitutionality of Florida's scheme on the basis of a challenge made under *Apprendi*.

Apprendi because it was not the job of the Florida Supreme Court to anticipate future United States Supreme Court action. *Id*. at 537. Instead of citing a single Florida case, this Court said it didn't have the "authority" to overrule the United States Supreme Court's decision in *Walton*, which was not a Florida case. *Id*. Thus, during this post-*Apprendi* period, Florida was not operating on the same ground on which Florida operated before *Apprendi* was decided. And this Court explicitly recognized this difference in *Johnson* when it noted that *Ring* was "not a sudden or unforeseeable development," but rather a "refinement" of *Apprendi*. 904 So. 2d at 405 (quoting *Monlyn v. State*, 894 So. 2d 832, 841 (Fla. 2004) (Pariente, C.J., specially concurring)).

Apprendi changed the calculus of the constitutionality of Florida's capital sentencing scheme, and the reliance factor weighs in favor of extending retroactivity to Petitioner, whose case became final after *Apprendi*. While the Court accurately noted in *Mosley* that Florida's prior capital sentencing scheme has been unconstitutional since *Ring*, it is equally true that Florida's scheme has been unconstitutional since *Apprendi*. And it is worth repeating here that both *Ring* and *Hurst* were applications of the Sixth Amendment rule originally announced in *Apprendi*. It was *Apprendi* that first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See* 530 U.S. at

490. The *Hurst* Court acknowledged that the *Ring* Court had applied *Apprendi*'s analysis to conclude that the petitioner's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. *Hurst* repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. And this Court most recently acknowledged in *Mosley* itself that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*.").

3. Effect on administration of justice

As applied to Petitioner's post-*Apprendi* death sentence, the third *Stovall*/*Linkletter* factor— the effect on the administration of justice—also favors applying those decisions retroactively. Under *Asay*, this factor will not weigh against retroactivity unless applying the *Hurst* decisions retroactively could "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So. 2d at 929–30). In *Mosley*, the Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, of which there are approximately 175, would not grind this state's judiciary to a halt. *See Mosley*, 209 So. 3d at 1281-83.

Because this Court has already ruled that the third *Stovall*/*Linkletter* factor weighs in favor of applying *Hurst* retroactively to all post-*Ring* death sentences, the

question is whether also applying *Hurst* retroactively to death sentences that became final in the two-year period between *Apprendi* and *Ring* would tip the balance to "burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So. 2d at 929–30).

There are only 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver (the total number of cases, including unanimous jury-vote cases and waiver cases, is 30). This is not an unworkable number of prisoners but, instead, a small, definite group. Petitioner urges that this Court apply its post-*Hurst* jurisprudence to his post-*Apprendi* case and vacate his unconstitutional death sentence.

III. The *Hurst* decisions should be applied retroactively to Petitioner under federal law

Even if the *Hurst* decisions did not apply retroactively to Petitioner's "post-*Apprendi*" death sentence under Florida's *Witt* retroactivity analysis, the United States Constitution requires this Court to apply *Hurst* retroactively in this case. While Florida may maintain its own state retroactivity doctrines, the United States Constitution sets a retroactivity "floor" to which all state retroactivity determinations must adhere. Under federal principles, *Hurst v. Florida* and *Hurst v. State* should be applied retroactively to Petitioner and other similarly situated prisoners without regard to when their death sentences became final on direct appeal. The concept of "partial retroactivity," whereby a constitutional rule is applied retroactively to some

cases on collateral review but not others, cannot be squared with the Eighth and Fourteenth Amendments.

The Supremacy Clause of the United States Constitution requires state post-conviction courts to apply "substantive" constitutional rules retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). This federal constitutional requirement applies even where a state supreme court has a separate retroactivity doctrine. *See id.* That was the issue before the United States Supreme Court in *Montgomery*, wherein a Louisiana defendant brought a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The Louisiana Supreme Court denied *Miller* relief on state retroactivity grounds. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* constitutional rule was substantive, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Florida's state courts are required to apply *Hurst* retroactively to all death-sentenced prisoners because the *Hurst* decisions established substantive rules within

the meaning of federal law. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule).

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty]

states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The logic supporting *Hurst* retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death. And with *Hurst*, unlike in *Summerlin*, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment's jury-trial guarantee. *See Summerlin*, 542 U.S. at 353.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional

standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). Indeed, federal judges in Florida have already recognized the impact of the beyond-a-reasonable-doubt standard on the federal retroactivity of *Hurst*. *See, e.g.*, *Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* may be retroactive as a matter of federal law because "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.") (citing *Ivan V.*).

The United States Supreme Court's decision in *Welch* is illustrative of the substantive nature of *Hurst*. In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized

that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rulings within the meaning of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the

"unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

The concept of "partial retroactivity" is inconsistent with federal law, which traditionally accepts only a binary approach to retroactivity analysis. In contrast, a framework that allows state courts to select which capital cases on collateral review can receive the retroactive benefit of a constitutional rule of law and which will not, based on the sentence's temporal relation to some precedent that came before the constitutional rule was announced, violates the United States Constitution. Under federal law, there is no such thing as partial retroactivity. If a state court decides that a constitutional rule is retroactive to some cases on collateral review, it cannot deny retroactivity to other cases based solely on the date the death sentence became final on direct appeal relative to some prior precedent.

Here, for purposes of federal law, Petitioner's right to *Hurst* retroactivity should not be impacted by the date his death sentence became final relative to *Ring*

or any other antecedent case. After all, partial retroactivity leads to arbitrary and impermissible results. For instance, if a retroactivity "line" is drawn at *Ring*, it would result in the denial of *Hurst* relief to individuals like Petitioner whose death sentences became final on direct appeal shortly before *Ring*, while at the same time granting *Hurst* retroactivity to other individuals who arrived on death row years, or perhaps decades, earlier but were granted new penalty phases and then resentenced to death after *Ring*. Failure to extend *Hurst* retroactivity to pre-*Ring* as well as post-*Ring* prisoners would violate the Eighth Amendment's requirement of culpability-related decision-making in capital cases, and the Fourteenth Amendment's requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

In addition, making *Hurst* only partially retroactive to post-*Ring* sentences would unfairly deny *Hurst* access to defendants, like Petitioner, who were sentenced between the decisions in *Apprendi* and *Ring.* The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*, and that it was *Apprendi* that required the Court to overrule its previous decision in *Walton* upholding Arizona's capital sentencing scheme. *See Ring*, 536 U.S. at 588-89. As for Florida, in *Hurst*, the Supreme Court

repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621.

In the final analysis, the idea of partial retroactivity violates the Eighth and Fourteenth Amendment prohibition against arbitrariness in imposing death sentences. The death penalty does not hold up when imposed under "sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). Partial retroactivity smacks of such unconstitutional arbitrariness. For instance, the date of finality relative to *Ring* might depend on whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer recess; how long the assigned Florida Supreme Court Justice took to draft the opinion; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error so that the Court had to issue a corrected opinion; whether appellate counsel chose to file a petition for a writ of certiorari or first, sought an extension for such a petition, or how long that petition remained pending in the United States Supreme Court; and so on. The itemization of factors can go on and on and all of them—from the

perspective of whether a death sentence should be carried out in an individual case—are arbitrary and capricious.

And there are other arbitrary factors affecting whether a defendant might get *Hurst* relief under a partial retroactivity approach, such as whether a resentencing was held or other intervening factors. In Florida today, even "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson*, 205 So. 3d at 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 2017 WL 1743835, at *1 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial).

The determination about the validity of a death sentence should not turn on such "arbitrary and capricious" factors. This Court should reject the idea of partial retroactivity under principles of federal law.

IV. The *Hurst* error in Petitioner's case is not harmless under this Court's decisions in light of the non-unanimous jury recommendation

The *Hurst* error in Petitioner's case is not harmless beyond a reasonable doubt under this Court's decisions because his advisory jury recommended the death

penalty by a non-unanimous vote of 10-2. As the Court held in *Dubose v. State*, "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of the applicable aggravating and mitigating circumstances. 210 So. 3d 641, 657 (Fla. 2017).

The Court has *never* found a *Hurst* error harmless in a case where the jury vote was not unanimous, and has now granted relief in dozens of non-unanimous-recommendation cases. *See, e.g. Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth*, 209 So. 3d. at 1163-65 (11-1 jury vote); *Hernandez v. Jones*, SC17-440, No. 2017 WL 1954985, at *1 (11-1 jury vote); *Card*, 2017 WL 1743835, at *1 (11-1 jury vote); *Braddy v. State*, No. SC15-404, 2017 WL 2590802, at *1 (Fla. June 15, 2017) (11-1 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (11-1 and 9-3 jury votes); *Durousseau v. State*, No. SC15-1276, 2017 WL 411331, at *5-6 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (10-2 jury vote); *Hodges v. State*, 213 So. 3d 863, 881 (Fla. 2017) (10-2 jury vote); *Hertz v. State*, No. SC17-456, 2017 WL 2210402 at *3 (10-2 jury vote); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3 jury votes); *Ault v. State*, 213 So. 3d 670, 679 (Fla. 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017) (9-3 jury vote); *Williams v. State*, 209 So. 3d 543, 565-67 (Fla.

2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (8-4 jury vote); *Mosley*, 209 So. 3d. at 1283 (8-4 jury vote); *Dubose*, 210 So. 3d. at 657 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4 jury vote); *Caylor v. State*, Nos. SC15-1823, SC16-399, 2017 WL 2210386, at *7 (8-4 jury vote); *Hall v. State*, No. SC14-2225, 2017 WL 2590704, at *1 (Fla. June 15, 2017) (8-4 jury vote); *Calloway*, 210 So. 3d at 1200 (7-5 jury vote); *Hurst v. State*, 202 So. 3d. at 69 (7-5 jury vote).

The *Dubose* holding that *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of this Court's analysis in *Hurst v. State*. Under *Hurst v. State*, this Court emphasized that Florida's courts may not speculate that, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. As this Court cautioned, engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So. 3d at 69; *see also Mosley*, 209 So. 3d. at 1284. The reasoning the Court applied in *Hurst v. State* applies here.

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

Hurst, 202 So. 3d at 68.

Even if precedent allowed courts to find *Hurst* errors harmless in cases with non-unanimous jury recommendations, the State still could not show that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt.

First, there is no reason to believe that a juror who voted to recommend a life sentence would vote to impose the death penalty in a hypothetical post-*Hurst* proceeding. On the contrary, it is more likely that *fewer* jurors would have made the required fact-finding to impose the death penalty had they known their verdict was binding because jurors evaluate evidence in a different way when they know they are required to conduct the fact-finding instead of simply providing a recommendation to a judge who will make the actual decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing significant negative impact of a jury's belief that ultimate responsibility for determining whether defendant will be sentenced to death lies elsewhere); *see also id.* at 341 (explaining that the Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility.").

Second, mitigation is an important consideration in assessing harmless error. *See Hurst*, 202 So. 3d at 68-69 ("[W]e cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently

substantial' to call for a life sentence."). The trial judge found mitigating circumstances. It cannot be convincingly demonstrated that jurors would find this mitigating evidence insignificant in a post-*Hurst* sentencing decision.

Third, if Petitioner's counsel's thinking had not been influenced by an unconstitutional statute, Petitioner and counsel could have pursued a different approach than the one taken in the advisory jury/judge-sentencing-scheme, including a different approach to jury selection, broader challenges to aggravation, and a broader presentation of mitigation. As such, it cannot be concluded that a jury unanimously would find the same specific aggravators as the judge or unanimously reject mitigators in a post-*Hurst* constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about the jury's vote relative to mitigating evidence).

Fourth, to the extent the State may argue that the *Hurst* error is rendered harmless by the fact that the aggravators applied to Petitioner included aggravators based on contemporaneous and/or prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin*, 209 So. 3d. at 1248 (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate

Franklin's death sentence from *Ring* and *Hurst v. Florida*."); *McGirth*, 209 So. 3d. at 1150 (contemporaneous felony); *Mosley*, 209 So. 3d. at 1256 (contemporaneous felony); *Armstrong*, 211 So. 3d. 864-65 (prior violent felony); *Calloway*, 210 So. 3d. at 1176 (prior violent felony); *Durousseau*, 2017 WL 411331, at *6 (prior violent felony); *Simmons*, 207 So. 3d at 861 (prior violent felony); *Williams*, 209 So. 3d. at 554 (prior violent and contemporaneous felonies). The same reasoning applies here.

Accordingly, the *Hurst* errors were not harmless based on the jury's non-unanimous recommendation and the other factors described above, and a re-sentencing is appropriate. If there is any doubt as to whether the *Hurst* errors in Petitioner's case were harmless, such doubts should be resolved after a remand for an evidentiary proceeding, at which Petitioner can develop evidence regarding the impact of the errors on defense counsel's overall strategy, challenges to the aggravation, and presentation of mitigation.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017, the foregoing was served via the e-portal to the Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, and Assistant Collateral Regional Counsel Robert Berry at robert.berry@ccrc-north.org.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 3

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-1219
Lower Tribunal No(s).:
101996CF001277XXAXMX

DONALD BRADLEY vs. JULIE L. JONES, ETC.

Petitioner(s) Respondent(s)

Petitioner shall show cause on or before Tuesday, October 17, 2017, why the habeas corpus should not be denied in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Respondent may file a reply on or before Wednesday, November 1, 2017, limited to no more than 15 pages. Petitioner may file a reply to the Respondent's reply on or before Monday, November 13, 2017, limited to no more than 10 pages.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

ROBERT R. BERRY
BILLY H. NOLAS
JENNIFER ANN DONAHUE

EXHIBIT 4

No. SC17-1219

IN THE

Supreme Court of Florida

DONALD BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S RESPONSE TO SEPTEMBER 27, 2017 ORDER TO SHOW CAUSE

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INTRODUCTION

Petitioner's death sentence was imposed pursuant to a sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). His sentence became "final" in 2001, after the United States Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A core issue in this case is whether this Court should apply its "retroactivity cutoff" to deny Petitioner *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), even though the rule announced in *Apprendi* was the basis for both *Ring* and *Hurst*.

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has also created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. There are 22 Florida cases without penalty-phase waivers and with non-unanimous jury recommendations that became "final" during the two-year period between *Apprendi* and *Ring*. This Court has never specifically addressed this "*Apprendi* gap" in any case, not even in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla.

Aug. 10, 2017). Nor has the Court directly addressed the constitutionality of denying *Hurst* retroactivity as a matter of federal law, in *Hitchcock* or any other case.[1]

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This case presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final after *Apprendi* but before *Ring*, rather than cabining *Hurst* relief to post-*Ring* death sentences. Petitioner respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Petitioner also requests that the Court permit full review in this case in accord with the normal, untruncated habeas and briefing rules.

Depriving Petitioner the opportunity for full merits review would constitute an arbitrary deprivation of the vested right to habeas corpus review under Article I, § 13, and Article V, § 3(b)(9), of the Florida Constitution. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

ARGUMENT

I. Petitioner's death sentence violates *Hurst*, and the error is not "harmless"

Petitioner was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the

[1] Relief should not be denied here in light of *Hitchcock*. Petitioner notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

On remand, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a unanimous recommendation by the jury to impose the death penalty. *Hurst v. State*, 202 So. 3d at 53-59. The Court also noted that even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Petitioner's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested

with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Petitioner to death. The record does not reveal whether Petitioner's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. But the record *is* clear that Petitioner's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Petitioner's pre-*Hurst* jury recommended the death penalty by a vote of 10-2. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless."). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.[2]

To the extent any of the aggravators applied to Petitioner were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does

[2] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote).

not authorize death sentences based on the mere existence of an aggravator. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why this Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").[3]

II. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Petitioner's post-*Apprendi* death sentence

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court has applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But

[3] Moreover, although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, the United States Constitution would also prohibit a denial of relief based on the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided—based solely on the pre-*Hurst* jury's advisory recommendation—would violate the Sixth and Eighth Amendments. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

the Court has created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases.

Petitioner's death sentence became final during the two-year period between *Apprendi* and *Ring*. The Court has never specifically addressed this "*Apprendi* gap" in its state-law retroactivity precedent, not even in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Moreover, the Court has not addressed the denial of *Hurst* retroactivity to post-*Apprendi* death sentences (or *any* pre-*Ring* sentences) as a matter of federal law.

The *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Petitioner the same *Hurst* relief being granted in scores of materially indistinguishable collateral-review cases, particularly given that his sentence became final after *Apprendi*, which was the constitutional basis for both *Ring* and *Hurst*. Denying Petitioner *Hurst* retroactivity because his death sentence became final after *Apprendi* in 2001, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. This Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to post-*Apprendi* death sentences because *Apprendi* was the constitutional basis for both *Ring* and *Hurst*

This Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to Petitioner's post-*Apprendi* death sentence because the rule announced in *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the United States Supreme Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S. Ct. at 621. Just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's scheme.

In *Hurst*, the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—*Hurst* stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639 (1990)—which also could not "survive the

reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holdings derived directly from *Apprendi*.

This Court has consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived from *Apprendi*. In *Mosley*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Court "applied its reasoning from *Apprendi*."). This was not a new observation; over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. *See, e.g.*, *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005) (explaining that "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was an evolutionary refinement in capital jurisprudence," in that "[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*.") (internal quotation omitted).

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the United States Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: the United States Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So.

2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the United States Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the United States Supreme Court and citing *Mills*), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would violate the federal constitutional prohibition against the arbitrary and capricious imposition of the death penalty, as well as the constitutional guarantees of equal protection and due process, to extend *Hurst* retroactivity to 14 years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*. Moreover, as discussed below, federal law prohibits a retroactivity "cutoff" at *Ring*, and requires that the *Hurst* decisions apply retroactively to all cases on collateral review, including post-*Apprendi* cases.

B. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty

This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. The death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious

manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). In other words, the death penalty cannot be imposed in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308.

Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether this Court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

In one striking example, this Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). Mr. Bowles's sentence, however, became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. Mr. Bowles, on the other hand, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the pre-*Ring* side of this Court's current retroactivity cutoff.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring*-based retroactivity approach include whether a resentencing was granted. Under the Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on

a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Petitioner, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Petitioner would not.

Moreover, under the Court's current rule, some litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture. *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009).[4]

[4] Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*, such as Petitioner, should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g.*, *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this "preservation" approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those

C. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment by a state actor like this Court, the question is whether there is a rational basis for the different treatment. *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the state's justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny,

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defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). Petitioner urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

this Court's *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying *Hurst* retroactivity to "pre-*Ring*" defendants like Petitioner violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state-created right to direct appeal); *Hicks*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state competency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment

preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 347. Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g.*, *Ohio Adult Parole Auth.*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31. In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

III. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review

As Petitioner argued in the pending habeas petition filed in this Court on June 29, 2017, the United States Supreme Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.[5] *Id.* at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state

[5] In light of this Court's restriction on the length of this response, Petitioner provides a summary of his arguments under *Montgomery* here, and incorporates by reference the more expansive arguments included in his June 29, 2017 petition (attached).

collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly, *Montgomery* found the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment), substantive even though the *Miller* rule had "a procedural component." *Id.* at 734. The *Montgomery* Court explained that "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.*

A. The *Hurst* decisions announced substantive rules that must be applied retroactively to Petitioner under the Supremacy Clause

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Petitioner under the Supremacy Clause. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those aggravators together are "sufficient" to justify imposition of the death penalty; and (3) that those aggravators together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient

immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* The rule is therefore substantive as a matter of federal retroactivity law. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735

(noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to

whether the aggravators were *sufficient* to impose death and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").[6]

[6] The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Petitioner's arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: "A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.* at *8 (internal quotation marks omitted). In contrast, this Court's application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) ("[W]e hold that the Supreme

B. This Court has an obligation to address Petitioner's federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Petitioner's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816). Addressing those claims meaningfully requires full briefing and oral argument. The federal constitutional issues were raised in *Hitchcock*, but this Court ignored them. Dismissing this appeal based on *Hitchcock* would compound that error.

CONCLUSION

This Court should hold that the *Hurst* decisions must be applied retroactively to Petitioner's post-*Apprendi* death sentence, vacate Petitioner's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

Court's decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury . . . . We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence must be unanimous"). Second, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute. Lambrix did not argue, as Petitioner does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

ATTACHMENT

No. SC17-___

IN THE

Supreme Court of Florida

DONALD LEE BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Petitioner Donald Lee Bradley's death sentence became final after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). His petition asks the Court to review his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Those decisions should be applied to this post-*Apprendi* case under this Court's retroactivity standards as well as under the standards of federal retroactivity law.

Although this Court has already made clear that the *Hurst* decisions apply retroactively to death sentences that became final after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court has not yet provided an opinion specifically discussing *Hurst* retroactivity for the small number of death sentences that became final during the two-year period between *Apprendi* and *Ring*. The same *Hurst* retroactivity analysis that this Court has extended to all post-*Ring* death sentences should extend to post-*Apprendi* death sentences, including Petitioner's, because *Apprendi* is the constitutional basis for *Ring* and for the *Hurst* decisions.

There are 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver. Here, the *Hurst* error is not harmless since the advisory jury recommended a death sentence by a vote of 10 to 2. Petitioner requests that this Court grant a writ of habeas corpus under the *Hurst* decisions, vacate his death sentence, and remand for a new penalty phase.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9), of the Florida Constitution. This proceeding is also authorized by Florida Rule of Appellate Procedure 9.030(a)(3). This petition complies with Rule 9.100(a) requirements.

REQUEST FOR ORAL ARGUMENT

This petition presents important retroactivity arguments based on the "post-*Apprendi*" posture of this case. Petitioner respectfully requests oral argument.

REQUEST THAT THIS HABEAS CORPUS ACTION NOT BE STAYED PENDING THE DECISION IN *HITCHCOCK*

The *Apprendi* retroactivity arguments presented by this habeas corpus petition are not briefed in the pending appeal in *Hitchcock*, No. SC17-445. Petitioner urges the Court to independently evaluate this post-*Apprendi* petition, address the important issues concerning post-*Apprendi* retroactivity it raises, and not stay these habeas proceedings pending the decision in *Hitchcock*.

BACKGROUND

In 1998, Petitioner was convicted of murder in the Circuit Court of the Fourth Judicial Circuit, in and for Clay County. *See Bradley v. State*, 787 So. 2d 732, 736 (Fla. 2001). The jury returned a generalized advisory recommendation to impose the death penalty by a vote of 10 to 2.

The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court, not the jury, specifically found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the offense was heinous, atrocious, or cruel; (2) the offense was committed in a cold, calculated, and premeditated manner; (3) the offense was committed for pecuniary gain; and (4) the offense was committed while engaged in the commission of a burglary. *See Bradley v. State*, 33 So. 3d 664, 670 n.4 (Fla. 2010). The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the aggravators were not outweighed by the mitigation.[1] Based upon the court's own fact-finding, the court sentenced Petitioner to death. *See Bradley*, 787 So. 2d at 738.

During the pendency of Petitioner's direct appeal, the United States Supreme Court decided *Apprendi* on June 26, 2000, but this Court thereafter affirmed Petitioner's death sentence on March 1, 2001. *See id*. at 734. Petitioner's sentence became "final" on November 26, 2001, when the United States Supreme Court

[1] The mitigation the trial court found included: (1) Petitioner had no significant history of prior criminal activity; (2) Petitioner's age at the time of the crime; (3) Petitioner overcame a chaotic childhood and dysfunctional family life to make real achievements in his own life, including establishing loving relationships in his family and reestablishing a relationship with his father; (4) Petitioner had been a good provider and father for his present wife and his children; (5) Petitioner loved his family and was loved by them; (6) Petitioner maintained a good employment record; (7) Petitioner was helpful to other people inside and outside his family; and (8) Petitioner showed sincere religious faith. *See id.*

denied his petition for a writ of certiorari. *Bradley v. Florida*, 534 U.S. 1048 (2001); *see also* Fla. R. Crim. P. 3.851(d)(1)(B) (providing that a Florida conviction and sentence becomes final on direct appeal upon the United States Supreme Court's disposition of a petition for a writ of certiorari). Seven months later, the United States Supreme Court decided *Ring*.

This Court subsequently affirmed the denial of Petitioner's initial Florida Rule of Criminal Procedure 3.851 motion for post-conviction relief and denied his accompanying petition for a writ of habeas corpus. *Bradley*, 33 So. 3d at 667. Petitioner's Rule 3.851 motion argued, among other things, that Florida's capital sentencing scheme was unconstitutional under *Apprendi* and *Ring*. *Id.* at 670 n.6.

Petitioner sought a federal writ of habeas corpus under 28 U.S.C. § 2254, which was denied by the United States District Court for the Middle District of Florida in 2014. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 3:10-cv-1078, ECF No. 15 (M.D. Fla. Mar. 12, 2014). The United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability. *Bradley v. Sec'y, Fla. Dep't. of Corr.*, No. 14-11630 (11th Cir. Sept. 12, 2014).

ARGUMENT

I. Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*

Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact necessary to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Florida's unconstitutional scheme, however, had an advisory jury to render a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that the jury, not the judge, must make the findings of fact required to impose the death penalty. *Id.*

In *Hurst v. State*, this Court explained that the Eighth Amendment also requires *unanimous* jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty,

and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[2] Each of those determinations are "elements" that must be found by a jury unanimously and beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

[2] This unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death may be imposed only upon unanimous jury verdicts.

Petitioner's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered a non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation. However, the record is clear that Petitioner's jurors were *not* unanimous as to whether the death penalty should even be recommended to the court.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments.

II. The *Hurst* decisions should apply retroactively to Petitioner under Florida's *Witt* retroactivity doctrine because his sentence became final after *Apprendi* was decided

The *Hurst* decisions should apply retroactively to Petitioner under the Florida retroactivity doctrine established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and this Court's post-*Hurst* retroactivity decisions. Petitioner's death sentence became final on November 26, 2001, after *Apprendi* was decided.

Under *Witt*, this Court applies changes in the law retroactively where those changes (1) emanate from either this Court or the United States Supreme Court; (2) are constitutional in nature; and (3) constitute developments of fundamental significance. *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015). For purposes of the third *Witt* prong, this Court decides whether developments in the law are of "fundamental significance" by analyzing three factors—purpose, reliance, and administration of justice—which *Witt* borrowed from the decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Falcon*, 162 So. 3d at 961.

This Court has already made clear that under a *Witt* analysis the *Hurst* decisions apply retroactively to all death sentences that became final after the 2002 decision in *Ring*. *See. e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has not yet squarely addressed *Hurst* retroactivity with respect to the small number of death sentences that became final during the two-year gap between *Apprendi* and *Ring*. This petition provides the Court with the opportunity to close the *Apprendi* gap by holding that the same *Hurst* retroactivity this Court has extended to post-*Ring* sentences should also extend to post-*Apprendi* sentences. *Apprendi* is the indispensable constitutional foundation for *Ring* and for the *Hurst* decisions, and extending *Hurst* retroactivity to post-*Apprendi* sentences satisfies all three prongs of a *Witt* analysis.

A. If Florida is to maintain a bright-line retroactivity rule for *Hurst* claims, the line should be drawn at *Apprendi* rather than *Ring* because both *Ring* and *Hurst* were extensions of *Apprendi*

If there is to be a bright-line retroactivity rule for *Hurst* claims, that line should be drawn at *Apprendi*, not *Ring*: *Ring* and *Hurst* both are merely extensions of the rule originally announced in *Apprendi*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the United States Supreme Court stated in *Hurst*, the *Ring* Court *applied Apprendi*'s *analysis* to conclude that Mr. Ring's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. Then, just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst v. Florida* applied *Apprendi*'s principles to Florida's capital sentencing scheme.

In *Hurst*, the Supreme Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was merely an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—the *Hurst* Court stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s similar overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639

(1990)—which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holding derived directly from *Apprendi*.

This Court has also consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived directly from *Apprendi*. Even in *Mosley v. State*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*."). And this was not a new observation: over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. For example, in *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005), the Court explained: "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was 'an evolutionary refinement in capital jurisprudence,' in that "[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*."

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the United States Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).

This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: that the United States Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So. 2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the United States Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the United States Supreme Court and citing *Mills*), *and King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same). In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would be arbitrary and fundamentally unfair to extend *Hurst* retroactivity to fourteen years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*.[3]

[3] The arbitrariness is particularly stark when we compare individual cases. For example, during the period between *Apprendi* and *Ring*, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, finding that *Hurst* was retroactive because his sentence became final after *Ring*. *See Card v. Jones*, SC17-453, 2017 WL 1743835 (Fla. May 4, 2017). However, Mr. Bowles, whose case was decided on direct appeal on the same day, might not obtain review under *Hurst* notwithstanding the post-*Apprendi* posture of his case.

B. Extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* and before *Ring* is supported by the three *Witt* factors

For the very same reasons this Court described in *Mosley v. State* with respect to post-*Ring* death sentences, extending *Hurst* retroactivity to the small number of Florida death sentences that became final after *Apprendi* is also proper under the *Witt* doctrine. As noted above, retroactivity under *Witt* requires analysis of three prongs, all of which are satisfied with respect to post-*Apprendi* death sentences.

In both *Mosley* and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court observed that there is no dispute that *Hurst* claims satisfy the first two *Witt* retroactivity prongs because they (1) arise from decisions of this Court and the United States Supreme Court, and (2) are constitutional in nature. However, with respect to the third *Witt* prong—whether the *Hurst* decisions are of "fundamental significance," as measured by the three *Stovall*/*Linkletter* factors (purpose, reliance, and administration of justice)—*Mosley* and *Asay* held that retroactivity analysis depends on the date an individual's death sentence became final on direct appeal. In *Mosley*, the Court analyzed the third *Witt* prong in light of a death sentence that became final after both *Apprendi* and *Ring*, and concluded that the *Hurst* decisions applied retroactively. In *Asay*, the Court analyzed the third *Witt* prong in light of a death sentence that became final before both *Apprendi* and *Ring*, and concluded that *Hurst v. Florida* did not apply retroactively.

This Court has not yet published an opinion specifically analyzing the third *Witt* prong in the context of a death sentence, like Petitioner's, that became final between *Apprendi* and *Ring*. As applied to Petitioner's post-*Apprendi* sentence, the *Hurst* decisions are of "fundamental significance" within the meaning of the third *Witt* prong and the three *Stovall*/*Linkletter* factors. All three *Stovall*/*Linkletter* factors favor retroactivity.

1. Purpose of new rule

As applied to Petitioner's post-*Apprendi* death sentence, the first *Stovall*/*Linkletter* factor—the purpose of *Hurst v. Florida* and *Hurst v. State*—weighs at least "in favor" of retroactivity, if not "heavily in favor." In *Asay*, which analyzed only *Hurst v. Florida*, this Court stated that the purpose of the United States Supreme Court's Sixth Amendment decision "is to ensure that a criminal defendant's right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by the jury." *Asay*, 210 So. 3d at 17. In *Mosley*, where this Court considered both *Hurst v. Florida* and the decision on remand in *Hurst v. State*, the Court added that the purpose of *Hurst v. State* was to enshrine Florida's "longstanding history requiring unanimous jury verdicts as to the elements of a crime" into the state's capital sentencing scheme. *Mosley*, 209 So. 3d at 1278. With those principles in mind, the *Asay* Court ruled in the context of a death sentence that became final nearly

a decade before both *Ring* and *Apprendi* that the purpose of *Hurst v. Florida* weighs "in favor" of retroactive application. *Asay*, 210 So. 3d at 18. In *Mosley*, in the context of a death sentence that became final after *Ring*, this Court concluded that the combined purpose of *Hurst v. Florida* and *Hurst v. State* weighed "heavily in favor" of retroactive application. *Mosley*, 209 So. 3d at 1248.

Here, under the reasoning of both *Mosley* and *Asay*, Petitioner's post-*Apprendi* death sentence weighs at least in favor of retroactive application, if not heavily in favor, given the closeness of his sentence's finality to the date *Ring* was decided. As this Court emphasized in *Asay*, the right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 210 So. 3d at 18 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life"). Or as the Court further noted in *Mosley*, there is a "critical importance of a unanimous jury verdict within Florida's independent constitutional right to a trial by jury." *Mosley*, 209 So. 3d at 1278. Given those critical features of the *Hurst* decisions, this Court should find that Petitioner's post-*Apprendi* sentence satisfies the "purpose" factor.

2. Extent of reliance on old rule

As applied to Petitioner's post-*Apprendi* death sentence, the second *Stovall*/*Linkletter* factor—the extent of reliance on Florida's unconstitutional pre-*Hurst* scheme—also weighs in favor of applying those decisions retroactively. This factor focuses on reliance on the idea that *Apprendi* did not apply to Florida's capital sentencing scheme. After *Apprendi*, Florida could no longer rely on the soundness of pre-*Apprendi* law, namely *Spaziano* and *Hildwin*, as that law was "irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623. As this Court explained in *Mosley*, the question is not whether Florida relied upon pre-*Apprendi* in good faith, but how *Hurst* and its antecedents changed the calculus of the constitutionality of Florida's capital sentencing scheme. *See Mosley*, 209 So. 3d at 1280. Thus, because *Apprendi* changed the calculus of Florida's capital scheme, this factor weighs in favor of applying retroactivity to post-*Apprendi* petitioners.

This Court concluded in *Asay* that reliance on the old rule weighed against retroactivity for a pre-*Apprendi* and pre-*Ring* petitioner because Florida had relied on the old rule for decades and 400 death row inmates had been sentenced under that rule. *Asay*, 210 So. 3d at 20. The Court reasoned that as of 1991 (a decade before *Apprendi*) "this Court and the State of Florida had every reason to believe that its

capital sentencing scheme was constitutionally sound." *Asay*, 210 So. 3d at 19.[4] *But the same is not true after Apprendi*.

The reliance factor therefore applies in a substantially different way for a prisoner whose sentence became final after *Apprendi*. Indeed, in his *Apprendi* concurrence, Justice Thomas plainly informed everyone that schemes like Florida's were on constitutionally uncertain ground and that the Supreme Court would be directly addressing those death penalty schemes in another case. *See Apprendi*, 530 U.S. at 523 (Thomas, J., concurring). From the day the opinion in *Apprendi* was issued, America's few judge-sentencing capital schemes (such as Florida's) were on a collision course with the Sixth Amendment.

Indeed, this Court's own decisions shifted after *Apprendi*, highlighting that the reliance factor favors retroactive application of the *Hurst* decisions to Petitioner. To be sure, it was after *Apprendi* that Justices of this Court recognized the shift and began acting on the basis of that recognition. For example, this Court began monitoring post-*Apprendi* appeals of death row inmates in other states. *See Mills*, 786 So. 2d at 537 (describing a Delaware petitioner's unsuccessful attempt to bring an *Apprendi* claim). And even more: in *Mills*, this Court rejected the application of

[4] Perhaps because of its context (review of a death sentence finalized in 1991), *Asay* did not discuss *Mills v. Moore*, the case where this Court, pre-*Ring*, considered the constitutionality of Florida's scheme on the basis of a challenge made under *Apprendi*.

Apprendi because it was not the job of the Florida Supreme Court to anticipate future United States Supreme Court action. *Id*. at 537. Instead of citing a single Florida case, this Court said it didn't have the "authority" to overrule the United States Supreme Court's decision in *Walton*, which was not a Florida case. *Id*. Thus, during this post-*Apprendi* period, Florida was not operating on the same ground on which Florida operated before *Apprendi* was decided. And this Court explicitly recognized this difference in *Johnson* when it noted that *Ring* was "not a sudden or unforeseeable development," but rather a "refinement" of *Apprendi*. 904 So. 2d at 405 (quoting *Monlyn v. State*, 894 So. 2d 832, 841 (Fla. 2004) (Pariente, C.J., specially concurring)).

Apprendi changed the calculus of the constitutionality of Florida's capital sentencing scheme, and the reliance factor weighs in favor of extending retroactivity to Petitioner, whose case became final after *Apprendi*. While the Court accurately noted in *Mosley* that Florida's prior capital sentencing scheme has been unconstitutional since *Ring*, it is equally true that Florida's scheme has been unconstitutional since *Apprendi*. And it is worth repeating here that both *Ring* and *Hurst* were applications of the Sixth Amendment rule originally announced in *Apprendi*. It was *Apprendi* that first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See* 530 U.S. at

490. The *Hurst* Court acknowledged that the *Ring* Court had applied *Apprendi*'s analysis to conclude that the petitioner's death sentence violated the Sixth Amendment. 136 S. Ct. at 621. *Hurst* repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. And this Court most recently acknowledged in *Mosley* itself that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Supreme Court "applied its reasoning from *Apprendi*.").

3. Effect on administration of justice

As applied to Petitioner's post-*Apprendi* death sentence, the third *Stovall*/*Linkletter* factor— the effect on the administration of justice—also favors applying those decisions retroactively. Under *Asay*, this factor will not weigh against retroactivity unless applying the *Hurst* decisions retroactively could "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So. 2d at 929–30). In *Mosley*, the Court held that categorically applying the *Hurst* decisions retroactively to all post-*Ring* defendants, of which there are approximately 175, would not grind this state's judiciary to a halt. *See Mosley*, 209 So. 3d at 1281-83.

Because this Court has already ruled that the third *Stovall*/*Linkletter* factor weighs in favor of applying *Hurst* retroactively to all post-*Ring* death sentences, the

question is whether also applying *Hurst* retroactively to death sentences that became final in the two-year period between *Apprendi* and *Ring* would tip the balance to "burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Asay*, 210 So. 3d at 20 (quoting *Witt*, 387 So. 2d at 929–30).

There are only 22 cases in this post-*Apprendi* category with a split jury vote and no predicate waiver (the total number of cases, including unanimous jury-vote cases and waiver cases, is 30). This is not an unworkable number of prisoners but, instead, a small, definite group. Petitioner urges that this Court apply its post-*Hurst* jurisprudence to his post-*Apprendi* case and vacate his unconstitutional death sentence.

III. The *Hurst* decisions should be applied retroactively to Petitioner under federal law

Even if the *Hurst* decisions did not apply retroactively to Petitioner's "post-*Apprendi*" death sentence under Florida's *Witt* retroactivity analysis, the United States Constitution requires this Court to apply *Hurst* retroactively in this case. While Florida may maintain its own state retroactivity doctrines, the United States Constitution sets a retroactivity "floor" to which all state retroactivity determinations must adhere. Under federal principles, *Hurst v. Florida* and *Hurst v. State* should be applied retroactively to Petitioner and other similarly situated prisoners without regard to when their death sentences became final on direct appeal. The concept of "partial retroactivity," whereby a constitutional rule is applied retroactively to some

cases on collateral review but not others, cannot be squared with the Eighth and Fourteenth Amendments.

The Supremacy Clause of the United States Constitution requires state post-conviction courts to apply "substantive" constitutional rules retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). This federal constitutional requirement applies even where a state supreme court has a separate retroactivity doctrine. *See id.* That was the issue before the United States Supreme Court in *Montgomery*, wherein a Louisiana defendant brought a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The Louisiana Supreme Court denied *Miller* relief on state retroactivity grounds. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* constitutional rule was substantive, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Florida's state courts are required to apply *Hurst* retroactively to all death-sentenced prisoners because the *Hurst* decisions established substantive rules within

the meaning of federal law. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule).

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty]

states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The logic supporting *Hurst* retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also the fact-finding as to whether the aggravators were *sufficient* to impose death. And with *Hurst*, unlike in *Summerlin*, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment's jury-trial guarantee. *See Summerlin*, 542 U.S. at 353.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional

standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). Indeed, federal judges in Florida have already recognized the impact of the beyond-a-reasonable-doubt standard on the federal retroactivity of *Hurst*. *See, e.g.*, *Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* may be retroactive as a matter of federal law because "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.") (citing *Ivan V.*).

The United States Supreme Court's decision in *Welch* is illustrative of the substantive nature of *Hurst*. In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized

that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rulings within the meaning of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the

"unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

The concept of "partial retroactivity" is inconsistent with federal law, which traditionally accepts only a binary approach to retroactivity analysis. In contrast, a framework that allows state courts to select which capital cases on collateral review can receive the retroactive benefit of a constitutional rule of law and which will not, based on the sentence's temporal relation to some precedent that came before the constitutional rule was announced, violates the United States Constitution. Under federal law, there is no such thing as partial retroactivity. If a state court decides that a constitutional rule is retroactive to some cases on collateral review, it cannot deny retroactivity to other cases based solely on the date the death sentence became final on direct appeal relative to some prior precedent.

Here, for purposes of federal law, Petitioner's right to *Hurst* retroactivity should not be impacted by the date his death sentence became final relative to *Ring*

or any other antecedent case. After all, partial retroactivity leads to arbitrary and impermissible results. For instance, if a retroactivity "line" is drawn at *Ring*, it would result in the denial of *Hurst* relief to individuals like Petitioner whose death sentences became final on direct appeal shortly before *Ring*, while at the same time granting *Hurst* retroactivity to other individuals who arrived on death row years, or perhaps decades, earlier but were granted new penalty phases and then resentenced to death after *Ring*. Failure to extend *Hurst* retroactivity to pre-*Ring* as well as post-*Ring* prisoners would violate the Eighth Amendment's requirement of culpability-related decision-making in capital cases, and the Fourteenth Amendment's requirement that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

In addition, making *Hurst* only partially retroactive to post-*Ring* sentences would unfairly deny *Hurst* access to defendants, like Petitioner, who were sentenced between the decisions in *Apprendi* and *Ring.* The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*, and that it was *Apprendi* that required the Court to overrule its previous decision in *Walton* upholding Arizona's capital sentencing scheme. *See Ring*, 536 U.S. at 588-89. As for Florida, in *Hurst*, the Supreme Court

repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621.

In the final analysis, the idea of partial retroactivity violates the Eighth and Fourteenth Amendment prohibition against arbitrariness in imposing death sentences. The death penalty does not hold up when imposed under "sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). Partial retroactivity smacks of such unconstitutional arbitrariness. For instance, the date of finality relative to *Ring* might depend on whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer recess; how long the assigned Florida Supreme Court Justice took to draft the opinion; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error so that the Court had to issue a corrected opinion; whether appellate counsel chose to file a petition for a writ of certiorari or first, sought an extension for such a petition, or how long that petition remained pending in the United States Supreme Court; and so on. The itemization of factors can go on and on and all of them—from the

perspective of whether a death sentence should be carried out in an individual case—are arbitrary and capricious.

And there are other arbitrary factors affecting whether a defendant might get *Hurst* relief under a partial retroactivity approach, such as whether a resentencing was held or other intervening factors. In Florida today, even "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson*, 205 So. 3d at 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 2017 WL 1743835, at *1 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial).

The determination about the validity of a death sentence should not turn on such "arbitrary and capricious" factors. This Court should reject the idea of partial retroactivity under principles of federal law.

IV. The *Hurst* error in Petitioner's case is not harmless under this Court's decisions in light of the non-unanimous jury recommendation

The *Hurst* error in Petitioner's case is not harmless beyond a reasonable doubt under this Court's decisions because his advisory jury recommended the death

penalty by a non-unanimous vote of 10-2. As the Court held in *Dubose v. State*, "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless," regardless of the applicable aggravating and mitigating circumstances. 210 So. 3d 641, 657 (Fla. 2017).

The Court has *never* found a *Hurst* error harmless in a case where the jury vote was not unanimous, and has now granted relief in dozens of non-unanimous-recommendation cases. *See, e.g. Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth*, 209 So. 3d. at 1163-65 (11-1 jury vote); *Hernandez v. Jones*, SC17-440, No. 2017 WL 1954985, at *1 (11-1 jury vote); *Card*, 2017 WL 1743835, at *1 (11-1 jury vote); *Braddy v. State*, No. SC15-404, 2017 WL 2590802, at *1 (Fla. June 15, 2017) (11-1 jury vote); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235, at *1 (11-1 and 9-3 jury votes); *Durousseau v. State*, No. SC15-1276, 2017 WL 411331, at *5-6 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (10-2 jury vote); *Hodges v. State*, 213 So. 3d 863, 881 (Fla. 2017) (10-2 jury vote); *Hertz v. State*, No. SC17-456, 2017 WL 2210402 at *3 (10-2 jury vote); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3 jury votes); *Ault v. State*, 213 So. 3d 670, 679 (Fla. 2017) (10-2 and 9-3 jury votes); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017) (9-3 jury vote); *Williams v. State*, 209 So. 3d 543, 565-67 (Fla.

2017) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (8-4 jury vote); *Mosley*, 209 So. 3d. at 1283 (8-4 jury vote); *Dubose*, 210 So. 3d. at 657 (8-4 jury vote); *Anderson v. State*, No. SC12-1252, SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4 jury vote); *Caylor v. State*, Nos. SC15-1823, SC16-399, 2017 WL 2210386, at *7 (8-4 jury vote); *Hall v. State*, No. SC14-2225, 2017 WL 2590704, at *1 (Fla. June 15, 2017) (8-4 jury vote); *Calloway*, 210 So. 3d at 1200 (7-5 jury vote); *Hurst v. State*, 202 So. 3d. at 69 (7-5 jury vote).

The *Dubose* holding that *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of this Court's analysis in *Hurst v. State*. Under *Hurst v. State*, this Court emphasized that Florida's courts may not speculate that, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. As this Court cautioned, engaging in such speculation "would be contrary to our clear precedent governing harmless error review." *Hurst v. State*, 202 So. 3d at 69; *see also Mosley*, 209 So. 3d. at 1284. The reasoning the Court applied in *Hurst v. State* applies here.

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

Hurst, 202 So. 3d at 68.

Even if precedent allowed courts to find *Hurst* errors harmless in cases with non-unanimous jury recommendations, the State still could not show that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt.

First, there is no reason to believe that a juror who voted to recommend a life sentence would vote to impose the death penalty in a hypothetical post-*Hurst* proceeding. On the contrary, it is more likely that *fewer* jurors would have made the required fact-finding to impose the death penalty had they known their verdict was binding because jurors evaluate evidence in a different way when they know they are required to conduct the fact-finding instead of simply providing a recommendation to a judge who will make the actual decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing significant negative impact of a jury's belief that ultimate responsibility for determining whether defendant will be sentenced to death lies elsewhere); *see also id.* at 341 (explaining that the Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and proceed[] with the appropriate awareness of its truly awesome responsibility.").

Second, mitigation is an important consideration in assessing harmless error. *See Hurst*, 202 So. 3d at 68-69 ("[W]e cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently

substantial' to call for a life sentence."). The trial judge found mitigating circumstances. It cannot be convincingly demonstrated that jurors would find this mitigating evidence insignificant in a post-*Hurst* sentencing decision.

Third, if Petitioner's counsel's thinking had not been influenced by an unconstitutional statute, Petitioner and counsel could have pursued a different approach than the one taken in the advisory jury/judge-sentencing-scheme, including a different approach to jury selection, broader challenges to aggravation, and a broader presentation of mitigation. As such, it cannot be concluded that a jury unanimously would find the same specific aggravators as the judge or unanimously reject mitigators in a post-*Hurst* constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about the jury's vote relative to mitigating evidence).

Fourth, to the extent the State may argue that the *Hurst* error is rendered harmless by the fact that the aggravators applied to Petitioner included aggravators based on contemporaneous and/or prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin*, 209 So. 3d. at 1248 (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate

Franklin's death sentence from *Ring* and *Hurst v. Florida*."); *McGirth*, 209 So. 3d. at 1150 (contemporaneous felony); *Mosley*, 209 So. 3d. at 1256 (contemporaneous felony); *Armstrong*, 211 So. 3d. 864-65 (prior violent felony); *Calloway*, 210 So. 3d. at 1176 (prior violent felony); *Durousseau*, 2017 WL 411331, at *6 (prior violent felony); *Simmons*, 207 So. 3d at 861 (prior violent felony); *Williams*, 209 So. 3d. at 554 (prior violent and contemporaneous felonies). The same reasoning applies here.

Accordingly, the *Hurst* errors were not harmless based on the jury's non-unanimous recommendation and the other factors described above, and a re-sentencing is appropriate. If there is any doubt as to whether the *Hurst* errors in Petitioner's case were harmless, such doubts should be resolved after a remand for an evidentiary proceeding, at which Petitioner can develop evidence regarding the impact of the errors on defense counsel's overall strategy, challenges to the aggravation, and presentation of mitigation.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017, the foregoing was served via the e-portal to the Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, and Assistant Collateral Regional Counsel Robert Berry at robert.berry@ccrc-north.org.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 5

IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Petitioner,

v.

CASE NO. SC17-1219
Lower Tribunal No.
1996CF1277
DEATH PENALTY CASE

JULIE L. JONES, ET AL.,

Respondents.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO SEPTEMBER 27, 2017, ORDER TO SHOW CAUSE

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STATEMENT OF THE CASE AND FACTS

Petitioner, Donald Bradley, was convicted of first-degree murder, burglary, and conspiracy, and was sentenced to death. Bradley v. State, 787 So.2d 732, 734-5 (Fla. 2001). The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on November 26, 2001. Bradley v. Florida, 534 U.S. 1048 (2001); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). This Court affirmed the denial of Petitioner's postconviction motion and denied a previous writ of habeas corpus. Bradley v. State, 33 So.3d 664, 685 (Fla. 2010). Petitioner sought a writ of habeas corpus in federal court, which was denied. Bradley v. Sec'y, Fla. Dep't of Corr., No. 3:10-cv-1078, 2014 WL 970033, *31 (M.D. Fla. Mar. 12, 2014). The Eleventh Circuit Court of Appeals denied Petitioner's request for a certificate of appealability. Bradley v. Sec'y, Fla. Dep't of Corr., No. 14-11630 (11th Cir. Sept. 12, 2014).

On June 29, 2017, Petitioner filed with this Court a Petition for Writ of Habeas Corpus. On July 18, 2017, this Court stayed the Petition pending the disposition of Hitchcock. On August 10, 2017, this Court affirmed the conviction and sentence in Hitchcock in accordance with this Court's decision in Asay. Hitchcock v. State, No. SC17-445, 2017 WL 3431500, *2 (Fla. Aug. 10, 2017);

Asay v. State, 210 So.3d 1 (Fla. 2016). On September 27, 2017, this Court issued an order for Petitioner to show cause as to "why the habeas corpus should not be denied in light of this Court's decision in Hitchcock v. State, SC17-455." On October 10, 2017, Petitioner filed his "Response to September 27, 2017 Order to Show Cause" (Response). This is the Respondents' reply to Petitioner's Response.

SUMMARY OF THE ARGUMENT

Petitioner has failed to show cause as to why his case should be excluded from this Court's precedent in Asay as reaffirmed by Hitchcock. Because Petitioner's case was final before Ring and Hurst is not retroactive under federal law, this Court should deny Bradley's Petition for Writ of Habeas Corpus.

ARGUMENT

In Asay, this Court held that Hurst v. State is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring. Asay, 210 So.3d at 22; Hurst v. State, 202 So.3d 40 (Fla. 2016); Ring v. Arizona, 536 U.S. 584 (2002). The judgment in Asay became final October 7, 1991, and thus Asay was not eligible for any relief under Hurst. Asay, 210 So.3d at 8.

In Asay, this Court discussed the appropriate test for applying retroactivity to Hurst. Asay, 210 So.3d at 15-16. This Court applied the Witt analysis for retroactivity under state law,

"which provides more expansive retroactivity standards than those adopted in Teague," which enumerates the federal retroactivity standards. Id. (emphasis in original), quoting Johnson v. State, 904 So.2d 400, 409 (Fla. 2005); Witt v. State, 387 So.2d 922 (Fla. 1980); Teague v. Lane, 489 U.S. 288 (1989); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that Teague).

Petitioner relies upon Ivan V. and Powell for the premise that Hurst should be retroactive under Teague as a substantive change. (Response at 19); Ivan V. v. City of New York, 407 U.S. 203, 205 (1972); Powell v. Delaware, 153 A.3d 69 (Del. 2016). Petitioner argues that Hurst "addressed the proof-beyond-a-reasonable-doubt standard." (Response at 19). However, the standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Floyd v. State, 497 So.2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So.2d 127, 129 (Fla. 1991); Finney v. State, 660 So.2d 674, 680 (Fla. 1995). The Delaware Court in Powell agreed: "neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof." Powell, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish Delaware's "watershed ruling" in Rauf which was the basis for Delaware to find that retroactivity applied to Powell under Teague, from Ring and Hurst. Powell, 153 A.3d at 74; Rauf

v. State, 145 A.3d 430 (Del. 2016). Thus, Powell applies to Delaware cases and distinguishes Hurst and Ring under Delaware law.

Further, despite Petitioner's claim that Hurst created a substantive change requiring federal retroactivity, in Schriro, the Supreme Court determined that Ring was a procedural rule and did not create a substantive constitutional change in the law because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Ring did not alter the "range of conduct or the class of persons that the law punishes." Id. Thus, Ring "announced a new procedural rule that does not apply retroactively to cases already final on direct review." Id. at 358. Since the Supreme Court held that Ring did not create a substantive constitutional rule and is not retroactive, and Hurst is based on Ring, Hurst is also not a substantive constitutional rule, nor is it retroactive under federal law.

Petitioner asserts the Eleventh Circuit declined to extend Hurst retroactively because they were bound by a narrow standard of review. However, the Eleventh Circuit denied Hurst relief because Hurst is not retroactive under federal law, stating: "[t]he Supreme Court has held that Ring does not apply retroactively to

cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358[ ] (2004) (holding that Ring does not apply retroactively under federal law to death-penalty cases already final on direct review.)." Lambrix v. Sec'y, Fla. Dep't of Corr., No. 17-14413, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017), cert. denied Lambrix v. Florida, Nos. 17-6290, 17A380, 2017 WL 4456332 (Oct. 5, 2017). Further, the Eleventh Circuit held that this Court's ruling, that Hurst did not retroactively apply to Lambrix, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro." Lambrix, 2017 WL 4416205 at *8. The Eleventh Circuit also rejected the statutory retroactivity argument stating

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision.

Id. at *9; see also Dobbert v. Florida, 432 U.S. 282, 301 (1977).

Additionally, with retroactivity, there is usually a cutoff date to provide for finality in appellate processing. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In Griffith, the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no

exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328 (1987); see also Smith v. State, 598 So.2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst, benefits more appellants. Thus, this Court's retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection and due process.

In Asay, this Court discussed Apprendi's role in developing the Court's decisions in Ring and Hurst. Asay, 210 So.3d at 11-19. However, "the Supreme Court distinguished capital cases from its holding in Apprendi." Id. at 19; citing Apprendi v. New Jersey, 530 U.S. 466, 496-97 (2000) ("this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes . . ."). Because Apprendi does not apply to capital cases, it should not be used as the cutoff date for Hurst retroactivity.

After Asay, this Court continuously adhered to using the Ring decision date as the cutoff point for retroactivity. Thus far, this Court has chosen not to extend Hurst v. State to 23 cases, including Asay, based solely on the fact that the judgments were

finalized prior to the decision in Ring.[1] Further, this Court declined to retroactively apply Hurst to Lukehart because his sentence became final prior to Ring. Lukehart v. Jones, No. SC16-

[1] See Asay, 210 So.3d at 8, 22 (sentence final in 1991; see Asay v. Florida, 502 U.S. 895 (1991)); Jones v. State, No. SC15-1549, 2017 WL 4296370, *2 (Sept. 28, 2017); Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017)(sentence final in 2000; see Hitchcock v. State, 531 U.S. 1040 (2000)); Zack v. State, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017)(sentence final in 2000; see Zack v. Florida, 531 U.S. 858 (2000)); Zakrzewski v. Jones, 221 So.3d 1159, 1159 (Fla. 2017)(sentence final in 1999; see Zakrzewski v. Florida, 525 U.S. 1126 (1999)); Oats v. Jones, 220 So.3d 1127, 1129 (Fla. 2017)(sentence final in 1985; see Oats v. Florida, 474 U.S. 865 (1985)); Marshall v. Jones, No. SC16-779, 2017 WL 1739246 (Fla. May 4, 2017)(sentence final in 1993; see Marshall v. Florida, 508 U.S. 915 (1993)); Rodriguez v. State, 219 So.3d 751, 760 (Fla. 2017)(sentence final in 1993; see Rodriguez v. Florida, 510 U.S. 830 (1993)); Willacy v. Jones, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017)(sentence final in 1997; see Willacy v. Florida, 522 U.S. 970 (1997)); Suggs v. Jones, No. SC16-1066, 2017 WL 1033680, *1 (Fla. Mar. 17, 2017)(sentence final in 1995; see Suggs v. Florida, 514 U.S. 1083 (1995)); Lukehart v. Jones, No. SC16-1225, 2017 WL 1033691, *1 (Mar. 17, 2017)(sentence final 2001; see Lukehart v. Florida, 533 U.S. 934 (2001)); Cherry v. Jones, No. SC16-694, 2017 WL 1033693, *1 (Fla. Mar. 17, 2017)(sentence final in 1990; see Cherry v. Florida, 494 U.S. 1090 (1990)); Archer v. Jones, No. SC16-2111, 2017 WL 1034409, *1 (Fla. Mar. 17, 2017)(sentence final in 1996; see Archer v. Florida, 519 U.S. 876 (1996)); Jones v. Jones, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017)(sentence final in 1995; see Jones v. Florida, 515 U.S. 1147 (1995)); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017)(sentence final in 1997; see Hartley v. Florida, 522 U.S. 825 (1997)); Geralds v. Jones, No. SC16-659, 2017 WL 944236, *1 (Fla. Mar. 10, 2017) (sentence final in 1996; see Geralds v. Florida, 519 U.S. 891 (1996)); Lambrix v. State, 217 So.3d 977, 989 (Fla. Mar. 9, 2017)(sentence final in 1986); Stein v. Jones, No. SC16-621, 2017 WL 836806 (Fla. Mar. 3, 2017)(sentence final in 1994; see Stein v. Florida, 513 U.S. 834 (1994)); Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017)(sentence final in 1998; see Hamilton v. Florida, 524 U.S. 956 (1998)); Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017)(sentence final in 1998; see Davis v. Florida, 524 U.S. 930 (1998)); Bogle v. State, 213 So.3d 833, 855 (Fla. 2017)(sentence final in 1995; see Bogle v. Florida, 516 U.S. 978 (1995)); Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Fla. Jan. 30, 2017)(sentence final in 1998; see Wainwright v. Florida, 523 U.S. 1127 (1998)); Gaskin v. State, 218 So.3d 399, 400 (Fla. Jan. 19, 2017)(sentence final in 1993; see Gaskin v. Florida, 510 U.S. 925 (1993)).

1255, 2017 WL 1033691, *1 (Fla. Mar. 17, 2017). Lukehart became final June 25, 2001, after the June 26, 2000, decision in Apprendi, but before Ring. Lukehart v. Florida, 533 U.S. 934 (2001). Thus, despite Petitioner's claim that this Court has never specifically addressed this "Apprendi gap," this Court has addressed the issue and declined to extend retroactivity to post-Apprendi/pre-Ring cases. (Response at 1).

On August 10, 2017, in Hitchcock, this Court reaffirmed the decision in Asay stating

> [a]lthough Hitchcock references various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to Asay.

Hitchcock, 2017 WL 3431500 at *2; see also Asay v. State, Nos. SC17-1400, SC17-1429, 2017 WL 3472836, *7 (Fla. Aug. 14, 2017) (rejecting the claim that Chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix v. State, No. SC17-1687, 2017 WL 4320637, *1 (Fla. Sept. 29, 2017) (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

Here, just as in Hitchcock, Petitioner raises various constitutional provisions to argue that Hurst v. State should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst v. State does not apply retroactively to Petitioner. This case became final on November 26, 2001, which is prior to the June 24, 2002, decision in Ring. As such, Hurst v. State is not retroactive to this case. Thus, this Petition should be denied.

Petitioner has demonstrated no cause that this Court should review his case. This Court's rulings in Asay and Hitchcock apply to Petitioner. Because Petitioner's judgment and sentence were final prior to the decision in Ring, Hurst is not retroactive to him.

CONCLUSION

WHEREFORE, this Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Robert Berry, Esq, at robert.berry@ccrc-north.org, and Billy Nolas, Esq, at billy_nolas@fd.org, Attorneys for Petitioner.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Jennifer A. Donahue
COUNSEL FOR RESPONDENTS

EXHIBIT 6

No. SC17-1219

IN THE

Supreme Court of Florida

DONALD BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

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RENEWED REQUESTS FOR BRIEFING AND ORAL ARGUMENT

Petitioner renews his requests that the Court permit untruncated briefing.

ARGUMENT

I. Respondent is incorrect in suggesting that *Hitchcock* and prior cases addressed federal retroactivity in the *Hurst* context

Respondent is incorrect in suggesting that *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), and prior cases addressed whether federal constitutional law requires *Hurst* to be applied retroactively to the small number of Florida death sentences, including Petitioner's, that became "final" on direct appeal during the two-year period between the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Respondent's Resp. at 6-9. In fact, *Hitchcock* did not specifically address the "*Apprendi* gap" or any of Petitioner's federal retroactivity arguments at all. *See* Petitioner's Resp. at 5-20.

This Court's opinion in *Hitchcock* did not even state that Mr. Hitchcock's death sentence became final between *Apprendi* and *Ring*, let alone specifically address the current federal constitutional arguments. *Hitchcock* did not address whether the federal Constitution permits a retroactivity "cutoff" that affords *Hurst* relief to defendants sentenced after the 2002 decision in *Ring* while denying *Hurst* relief to defendants sentenced before *Ring* but after the 2000 decision in *Apprendi*. Instead, *Hitchcock* relied exclusively on the Court's state-law reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), which did not involve a post-*Apprendi* sentence. As

Respondent acknowledges, the reasoning in *Asay* rested entirely on the state retroactivity law first articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* Respondent's Resp. at 3 ("In *Asay* . . . . [t]his Court applied the *Witt* analysis for retroactivity under state law."). *Asay*'s exclusive reliance on state law is evident from the *Asay* opinion itself. *See* 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.").

Asay did not address whether federal law required the *Hurst* decisions to be applied retroactively in post-*Apprendi* death sentences like Petitioner's, and did not address the federal retroactivity arguments raised in Petitioner's response to the order to show cause. Namely, *Asay* did not address whether it would violate the Eighth and Fourteenth Amendments to draw a *Hurst* retroactivity "cutoff" at *Ring*, rather than *Apprendi*, in light of the fact that *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. Neither did *Asay* address more generally whether a retroactivity cutoff drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Hitchcock, in relying totally on *Asay*, also did not address Petitioner's "post-*Apprendi*" and other federal retroactivity arguments. *See Hitchcock*, 2017 WL 3431500, at *1 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* at *2 ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*."). Respondent attempts to highlight the conclusory sentence in *Hitchcock* that reads: "Although Hitchcock references various *constitutional provisions* as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior *Ring*." Respondent's Resp. at 8 (citing *Hitchcock*, 2017 WL 3431500, at *2) (emphasis added). But the *Hitchcock* Court's reference to "constitutional provisions" cannot be read to address Petitioner's federal arguments, as the very next sentence reads: "As such, these arguments were rejected when we decided *Asay*." *Hitchcock*, 2017 WL 3431500, at *2. As explained above, *Asay* was premised entirely on *state* retroactivity law.

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants, including those sentenced between *Apprendi* and *Ring*, raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those federal matters in its exclusively-state-law analysis, and imploring the courts to explicitly address federal

law. Those defendants, as Petitioner did here, made federal arguments under the Eighth and Fourteenth Amendments and *Montgomery*. If this Court had intended to put those arguments to rest in *Hitchcock*—including whether a retroactivity cutoff at *Ring* is unconstitutional as applied to post-*Apprendi* defendants—it could have done so, but the *Hitchcock* Court declined to do so. *Hitchcock* does not even mention the small number of death sentences that became final between *Apprendi* and *Ring*, the Eighth Amendment's prohibition against arbitrary and capriciousness, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery* or address whether the *Hurst* rules are "substantive." These matters all remain open questions that this Court should address.

To the extent Respondent suggests that Petitioner's federal arguments have been addressed in other cases, those decisions did not involve post-*Apprendi* death sentences and, in any event, are not applicable here. For instance, the Eleventh Circuit's decision in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not deal with a post-*Apprendi* case, is not precedential in this Court, and was decided in the context of the federal habeas statute. Moreover, *Lambrix* dealt primarily with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not focus squarely on the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations and "pre-*Apprendi*" postures also render inapplicable to Petitioner this

Court's active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017). There are real, unresolved issues here. Petitioner urges this Court to address them.

II. Respondent's argument regarding the constitutionality of denying *Hurst* retroactivity to post-*Apprendi* sentences is meritless

Respondent makes only passing reference to Petitioner's arguments regarding the federal constitutionality of drawing a *Hurst* retroactivity cutoff at *Ring*, given that *Apprendi* is the constitutional basis for both *Ring* and *Hurst*. *See* Petitioner's Resp. at 6-9; Respondent's Resp. at 6. Respondent acknowledges that Petitioner's death sentence became final after *Apprendi*, *see* Respondent's Resp. at 1, and also recognizes "*Apprendi*'s role in developing the Court's decisions in *Ring* and *Hurst*," *id*. at 6. But confronted with Petitioner's argument that a *Hurst* retroactivity cutoff, if there must be a cutoff, should be drawn at *Apprendi*, not *Ring*, Respondent offers on the superficial assertion: "*Apprendi* does not apply to capital cases." *Id.*

Respondent's superficial assertion is meritless. As Petitioner explained, a *Ring*-based cutoff cannot be squared with federal constitutional requirements, particularly in cases with post-*Apprendi* sentences. Respondent's contention that "*Apprendi* does not apply to capital cases" is belied by the *Ring* and *Hurst* decisions. Indeed, as the United States Supreme Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S. Ct. at 621. In *Hurst*, the Court repeatedly stated that Florida's scheme

was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. Both *Ring* and *Hurst* make clear that their operative constitutional holdings derived directly from *Apprendi*. And this Court in *Mosley v. State* recently reaffirmed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d 1248, 1279-80 (Fla. 2016) (stating that in *Ring* the Court "applied its reasoning from *Apprendi*").

There are only 22 prisoners in Florida in a non-waiver, non-unanimous jury, post-*Apprendi* posture. In light of *Apprendi*'s fundamental importance to *Ring* and *Hurst*, it would violate the federal constitutional prohibition against arbitrary and capricious death sentencing, and the guarantees of equal protection and due process, to extend *Hurst* retroactivity to 14 years of post-*Ring* death sentences while denying retroactivity to the small number of non-unanimous-recommendation sentences, like Petitioner's, that were finalized in the two years between *Apprendi* and *Ring*.

III. Respondent's cursory response to Petitioner's more general federal retroactivity arguments regarding the *Ring* cutoff should also be rejected

Respondent fails to substantively engage most of Petitioner's more general federal retroactivity arguments regarding the *Ring* cutoff. Respondent does not even mention or address Petitioner's argument that a retroactivity cutoff at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty. *See* Petitioner's Resp. at 9-13. Respondent also does not cite *Montgomery*, let alone address Petitioner's argument that because the *Hurst* decisions are substantive, the Supremacy Clause of the Constitution requires state

courts to apply them retroactively. *See id.* at 15-20. Respondent has therefore abandoned any arguments on those issues. *Cf. Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("[A]n issue not raised in an initial brief is deemed abandoned").

Respondent offers only a cursory response to Petitioner's arguments under the Fourteenth Amendment. According to Respondent, a *Ring*-based cutoff does not violate the Equal Protection and Due Process Clauses any more than a traditional rule that provides for only prospective application of new constitutional rules. *See* Respondent's Resp. at 5-6. Respondent assumes that "partial" retroactivity is constitutional because it "benefits more appellants," no matter where the line is drawn. *Id.* at 6. Notably, however, Respondent fails to provide an example of any previous constitutional ruling that has been given only "partial" retroactive effect, and does not engage in any specific due process or equal protection analysis.

Respondent's failure to address Petitioner's Eighth Amendment arguments and cursory treatment of his Fourteenth Amendment arguments is telling. A *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness, as well as a denial of equal protection and due process, that is not present in typical circumstances where retroactivity is withheld based on the pragmatic necessity to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. A retroactivity cutoff at *Ring* inaugurates a kind and degree of capriciousness that far exceeds the level justified

by normal non-retroactivity jurisprudence. Indeed, a *Ring*-based cutoff precludes relief in precisely the class of cases in which relief makes the most sense.

For instance, inmates whose death sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State. Pre-*Ring* inmates are more likely to have been given death sentences under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic factfinding. The past two decades have witnessed a broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was accepted without question in pre-*Ring* capital trials. Doubts that would cause today's prosecutors, juries, and judges to hesitate to seek or impose death were unrecognized in the pre-*Ring* era. Taken together, these considerations highlight that a *Ring*-based retroactivity cutoff involves a level of caprice that runs beyond that tolerated by typical retroactivity rules.

Respondent's remaining arguments can be dispensed with briefly. Respondent cites *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), for the proposition that the Supreme Court's ruling that *Ring* is not retroactive in a federal habeas proceeding means that *Hurst* is not retroactive in any proceeding. *See* Respondent's Resp. at 4-5. But as Petitioner explained in his earlier response, *see* Petitioner's Resp. at 19-20, the Arizona statute at issue in *Ring* and *Summerlin* did not require, as Florida's statute did, factfinding regarding both the aggravators *and* their "sufficiency" for the death penalty. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred with the *Hurst* decisions. They recognized for the first time that it is unconstitutional for a judge alone to make a finding of fact concerning the "sufficiency" of the aggravation.

Moreover, unlike *Ring*, *Hurst* was grounded on the beyond-a-reasonable-doubt standard. Respondent unpersuasively attempts to distinguish *Ivan V. v. City of New York*, 407 U.S. 203 (1972). *See* Respondent's Resp. at 3. Even assuming, as Respondent suggests, that Florida's scheme formerly incorporated the beyond-a-reasonable-doubt standard, the standard was misapplied to factfinding by the trial judge, not findings made by the jury. The *Hurst* decisions held that *the jury* must make the beyond-a-reasonable-doubt findings that subject a defendant to a death sentence. Indeed, a federal judge in Florida, citing *Ivan*, has already observed the

distinction between *Summerlin* and *Hurst* because of the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (contrasting *Hurst* to *Ring* and *Summerlin* because the latter decisions "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

Respondent's citation to *Powell*, *see* Respondent's Resp. at 3-4, is particularly odd considering that the Delaware Supreme Court in *Powell* applied a retroactivity test that mirrors the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and held that *Hurst* should be applied retroactively in Delaware. *See* and *Powell v. Delaware*, 153 A.3d 69, 75-76 (Del. 2016). If anything, *Powell* supports Petitioner's arguments.

IV. Respondent abandons any "harmless error" arguments

Respondent abandons any argument that the *Hurst* error in Petitioner's case was harmless by failing to reference harmless error in its response. *See Hoskins*, 75 So. 3d at 257. The *Hurst* error in his case is not harmless in light of the advisory jury's non-unanimous recommendation to impose the death penalty.

CONCLUSION

The Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Petitioner's post-*Apprendi* death sentence and grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

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.

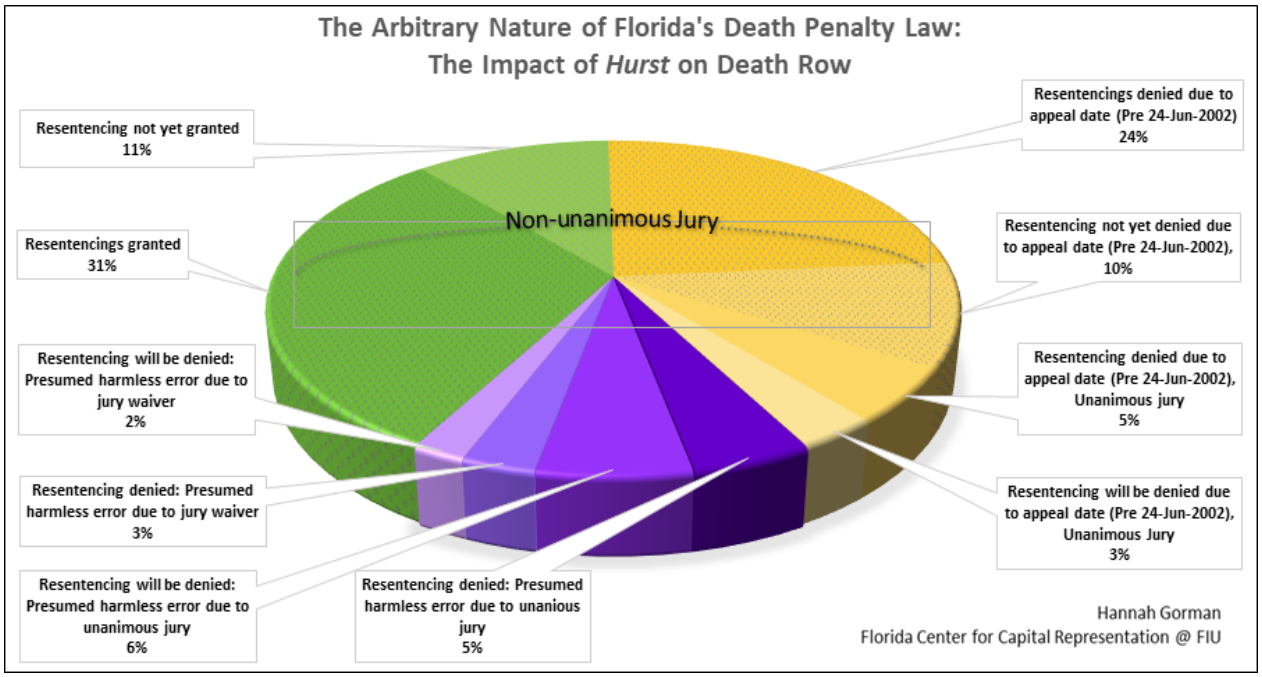
The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Non-unanimous Jury
Resentencings granted
31%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing 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 494427 (Fla. Jan. 22, 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*, 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*, 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)