**No. _____**

IN THE

# Supreme Court of the United States

STEPHEN TODD BOOKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

## PETITIONER'S APPENDIX

***THIS IS A CAPITAL CASE***

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# Supreme Court of Florida

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No. SC18-541

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**STEPHEN TODD BOOKER,**
Appellant,

vs.

**STATE OF FLORIDA,**
Appellee.

August 30, 2018

PER CURIAM.

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

Booker's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). Booker responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), should not be dispositive in this case.

After reviewing Booker's response to the order to show cause, as well as the State's arguments in reply, we conclude that our prior denial of Booker's petition for a writ of habeas corpus raising similar claims is a procedural bar to the claims at issue in this appeal. All of Booker's claims depend upon the retroactive application of *Hurst*, to which we have held he is not entitled. *See Booker v. Jones*, 235 So. 3d 298, 299 (Fla. 2018); *Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Booker's motion.

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

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

An Appeal from the Circuit Court in and for Alachua County,
William Elbridge Davis, Judge - Case No. 011977CF002332AXXXXX

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida, and Ann Finnell of Finnell, McGuinness, Nezami & Andux, P.A., Jacksonville, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

# Supreme Court of Florida

MONDAY, MAY 7, 2018

**CASE NO.: SC18-541**
Lower Tribunal No(s).:
011977CF002332AXXXXX

STEPHEN TODD BOOKER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Tuesday, May 29, 2018, why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Wednesday, June 13, 2018, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, June 25, 2018, 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

cd
Served:

BILLY H. NOLAS
ANN E. FINNELL
LISA HOPKINS

**No. SC18-541**

IN THE

# Supreme Court of Florida

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STEPHEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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## APPELLANT'S RESPONSE TO MAY 7, 2018 ORDER TO SHOW CAUSE

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## INTRODUCTION

Appellant'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 Appellant *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. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Appellant also requests that the Court permit full review in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Appellant the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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

## ARGUMENT

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

Appellant 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 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.

Appellant'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 Appellant to death. The record does not reveal whether Appellant'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 Appellant's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Appellant's pre-*Hurst* jury recommended the death penalty by a vote of 8-4. 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 Appellant 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 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]

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[2] *See, e.g., Bailey v. Jones*, 225 So. 3d 776, 777 (Fla. 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).

[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

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

Appellant'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 Appellant 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

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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).

*Ring* and *Hurst*. Denying Appellant *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 Appellant'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 Appellant 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 Appellant, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Appellant 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); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).[4]

### 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

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

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, 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 Appellant 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

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. *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 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 Appellant under the Supremacy Clause

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Appellant 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.").[5]

[5] *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Appellant'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

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

Because this Court is bound by the federal constitution, it has the obligation to address Appellant'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 Appellant's post-*Apprendi* death sentence, vacate Appellant's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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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 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 Appellant 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 May 28, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
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IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-541
L.T. NO. 1991-CF-008144
DEATH PENALTY CASE

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

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Appellant, Stephen Todd Booker, was convicted of first-degree murder, sexual battery, and burglary, and sentenced to death. Booker v. State, 397 So. 2d 910 (Fla. 1981). After the penalty phase the jury recommended death by a nine-to-three vote. The trial court followed the jury's recommendation, sentencing Appellant to death. The trial court found no mitigating circumstances and three aggravating circumstances: 1) previously convicted of a felony involving the use of threat of violence to another; 2) committed the murder during the commission of a sexual battery and burglary; and 3) heinous, atrocious, and cruel. See Booker v. State, 773 So. 2d 1079, 1082 n.1 (Fla. 2000).

Appellant's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. Booker, 397 So. 2d 910. Appellant filed a petition for writ of certiorari in the United States Supreme Court which the Court denied. Booker v. Florida, 454 U.S. 957, 102 S.Ct. 493 (1981).

Subsequently, Appellant filed numerous proceedings in state and federal courts. In particular, Appellant filed a petition for writ of habeas corpus which the Florida Supreme Court found that any error in light of the United States Supreme Court's 1987 decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), was harmless. The Florida Supreme Court upheld Appellant's sentence. Booker v. State, 520 So. 2d 246, 247-49 (Fla. 1988). However, the Eleventh

Circuit found that the Hitchcock error was not harmless and the case was remanded for resentencing. Booker v. Dugger, 922 F.2d 633, 634 (11th Cir. 1991).

A new penalty phase hearing was conducted in March 1998. The jury voted eight-to-four for death. The trial court, following the jury's recommendation, sentenced Appellant to death. The trial court found four aggravating circumstances: 1) committed the felony while he was under sentence of imprisonment; 2) previously convicted of a violent felony; 3) committed the capital felony while engaged in the commission of a sexual battery and burglary; and 4) heinous, atrocious, and cruel. The trial court found two statutory mitigators: 1) committed while under the influence of extreme mental or emotional disturbances and 2) capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court found nine nonstatutory mitigating circumstances. Booker, 773 So. 2d at 1086. Appellant filed a petition for writ of certiorari that was denied by the United States Supreme Court on May 14, 2001. Booker v. Florida, 532 U.S. 1033 (2001).

Appellant filed a motion for postconviction relief which was denied by the trial court and affirmed by the Florida Supreme Court. Booker v. State, 969 So. 2d 186 (Fla. 2007). On June 24, 2016, Appellant represented by Billy Nolas, filed a successive motion raising a claim based on the United States Supreme Court's

recent decision in Hurst v. Florida, 136 S.Ct. 616 (2016). The trial court appointed attorney Ann Finnell as lead capital collateral counsel and the capital habeas unit of the public defender's office as co-counsel. Attorney Ann Finnell subsequently adopted the successive motion filed on June 24, 2016. The successive motion was denied.

On June 27, 2017, Appellant filed with this Court a petition for 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, 226 So. 3d 216, 217 (Fla. 2017); Asay v. State, 210 So. 3d 1 (Fla. 2016). On September 27, 2017, this Court ordered the parties to show cause "why the habeas petition should not be denied in light of the decision in Hitchcock v. State, SC17-445." On January 30, 2018, this Court, after briefs were filed by the parties, held that Appellant is not entitled to relief under Hurst, as his case was final prior to the decision in Ring v. Arizona, 536 U.S. 584 (2002). On March 8, 2018, the postconviction court, in accordance with the decision by this Court, denied Appellant relief under Hurst. Appellant, on April 9, 2018, filed this appeal. On May 7, 2018, this Court ordered the parties to show cause "why the trial court's order should not be affirmed in light of this Court's

decision in Hitchcock v. State, SC17-445." This is Appellee's Answer to Appellant's Response.

## OBJECTION TO ORAL ARGUMENT

Appellee objects to Appellant's request for oral argument. In the briefing schedule, this Court ordered the parties to respond to a limited issue that has been decided by this Court in this case, as well as other cases. As such, oral arguments would not serve any purpose other than to delay the proceedings.

## SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Appellant's successive motion for postconviction relief. Appellant 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 Appellant's judgment and sentence were final prior to the decision in Ring, Hurst is not retroactive to him.

## ARGUMENT

This Court has already determined that Appellant is not entitled to relief under Hurst v. State in Booker v. Jones, 235 So. 3d 298 (Fla. 2018). "Generally, under the doctrine of the law of the case, 'all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts.'" State v. Owen, 696 So. 2d 715, 720 (Fla. 1997). Citing Brunner Enters., Inc. v. Dep't of Revenue, 452 So. 2d 550,

552 (Fla. 1984). This Court has already heard the arguments made by Appellant and they were rejected. Booker, 235 So. 3d 298. As such, this Court's prior ruling that Appellant should not get relief under Hurst v. State and Hitchcock is controlling precedent and Appellant should be denied relief.

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, 536 U.S. 584. 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, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than Teague).

Appellant 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). Appellant 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 Appellant'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, Hurst is also not a substantive constitutional rule, nor is it retroactive under federal law.

The Eleventh Circuit has rejected the argument that Hurst is 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., 872 F.3d 1170, 1182 (11th Cir. 2017), cert. denied, Lambrix v. Florida, 138 S.Ct. 312 (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, 872 F.3d at 1182. The Eleventh Circuit also rejected the statutory retroactivity argument stating

> jurists of reason would not find this proposition 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 1183; 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

[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, 231 So. 3d 374, 376 (Fla. 2017); Hitchcock, 2017 WL 3431500(sentence final in 2000; see Hitchcock v. State, 531 U.S. 1040 (2000)); Zack v. State, 228 So. 3d 41, 47-48 (Fla. 2017)(sentence final in 2000; see Zack v. Florida, 531 U.S. 858 (2000)); Zakrzewski v. Jones, 221 So. 3d 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, 226 So. 3d 211 (Mem) (Fla. 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 (Fla. 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 (Fla. Mar. 17, 2017)(sentence final in 1995; see Jones v. Florida, 515 U.S.

declined to retroactively apply Hurst to Lukehart because his sentence became final prior to Ring. Lukehart v. Jones, No. SC16-1255, 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 Appellant'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,

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1147 (1995)); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Fla. 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. 2017)(sentence final in 1993; see Gaskin v. Florida, 510 U.S. 925 (1993)).

> 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, 226 So. 3d at 217; see also Asay v. State, 224 So. 3d 695, 703 (Fla. 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, 227 So. 3d 112, 113 (Fla. 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, Appellant 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 Appellant. This case became final on May 14, 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 appeal should be denied.

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

## CONCLUSION

In conclusion, as a matter of law, Appellant is not entitled to Hurst relief, and Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant relief under Hurst.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 8th day of June, 2018, 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: Billy Nolas, counsel for Appellant, at billy_nolas@fd.org and Ann Finnell at afinnell@fmnlawyers.com.

**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/ Lisa A. Hopkins*
COUNSEL FOR APPELLEE

**Nos. SC18-541**

IN THE

# Supreme Court of Florida

STEPHEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

## APPELLANT'S REPLY IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

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## RENEWED REQUESTS FOR BRIEFING AND ORAL ARGUMENT

Mr. Booker renews his requests that the Court permit untruncated briefing.

## ARGUMENT

### I. The State is incorrect in its assertion that the law of the case doctrine precludes relief on Mr. Booker's *Hurst* claim

The State incorrectly asserts that a prior ruling in Mr. Booker's case precludes this Court from granting relief on his *Hurst* claim now under the law of the case doctrine, State's Resp. at 4-5. This Court has made clear that this is not how the law of the case doctrine works, however. The doctrine does "require[] that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). But it "is more limited and more flexible in scope" than res judicata, and as a result, "even as to those issues actually decided, the law of the case doctrine . . . provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case . . . ." *Id.* at 105-06. As explained by Mr. Booker's response to the show cause order and the arguments contained herein, any denial of *Hurst* relief to Mr. Booker, a post-*Apprendi* appellant, was in error, and this Court should exercise its power to correct that error.

### II. The State is incorrect in suggesting that *Hitchcock* and prior cases addressed federal retroactivity in the *Hurst* context

The State is incorrect in suggesting that *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), and prior cases addressed whether federal constitutional law requires *Hurst* to be applied retroactively to the small number of Florida death sentences, including Mr. Booker'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* State's Resp. at 8-11. In fact, *Hitchcock* did not specifically address the "*Apprendi* gap" or any of Mr. Booker's federal retroactivity arguments at all. *See* Booker's Resp. at 6-20.

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 the State 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* State's Resp. at 5 ("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 Mr. Booker's, and did not address the federal retroactivity arguments raised in Mr. Booker'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 Mr. Booker's "post-*Apprendi*" and other federal retroactivity arguments. *See Hitchcock*, 226 So. 3d at 217 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* ("Accordingly, we affirm the circuit court's order summarily

denying Hitchcock's successive postconviction motion pursuant to *Asay*."). The State 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 to *Ring*." State's Resp. at 10-11 (citing *Hitchcock*, 226 So. 3d at 217) (emphasis added). But the *Hitchcock* Court's reference to "constitutional provisions" cannot be read to address Mr. Booker's federal arguments, as the very next sentence reads: "As such, these arguments were rejected when we decided *Asay*." *Hitchcock*, 226 So. 3d at 217. 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 Mr. Booker 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.

The State also relies on this Court's decision in *Lukehart v. Jones*, No. SC16-1255, 2017 WL 1033691, at *1 (Fla. Mar. 17, 2017), to suggest that this Court already "specifically addressed" the post-*Apprendi* cases. State's Resp. at 9-10. However, *Lukehart* was a habeas petition filed in July 2016, before this Court even addressed *Hurst* retroactivity in *Asay* and *Mosley*. It could not have addressed the unconstitutionality of a retroactivity test that had not yet been adopted. Perhaps for that reason, the petition in *Lukehart* did not raise any form of *Apprendi*-based argument and is not in any way comparable to the arguments being made by Mr. Booker now.

To the extent the State suggests that Mr. Booker'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*, 872 F.3d 1170 (11th Cir. 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 Mr. Booker this Court's active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), and *Hannon v. State*, 228 So. 3d 505 (Fla. 2017). There are real, unresolved issues here. Mr. Booker urges this Court to address them.

## III. The State's argument regarding the constitutionality of denying *Hurst* retroactivity to post-*Apprendi* sentences is meritless

The State's brief references to Mr. Booker'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*, are unpersuasive. The State acknowledges that Mr. Booker's death sentence became final on May 14, 2001, *see* State's Resp. at 2, after *Apprendi*, and also recognizes "*Apprendi*'s role in developing the Court's decisions in *Ring* and *Hurst*," *id.* at 8. But confronted with Mr. Booker's argument that a *Hurst* retroactivity cutoff, if there must be a cutoff, should be drawn at *Apprendi*, not *Ring*, the State offers only the superficial assertion: "*Apprendi* does not apply to capital cases." *Id.*

The State's argument is meritless. As Mr. Booker explained, a *Ring*-based cutoff cannot be squared with federal constitutional requirements, particularly in

cases with post-*Apprendi* sentences. The State'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 Mr. Booker's, that were finalized in the two years between *Apprendi* and *Ring*.

## IV. The State's cursory response to Mr. Booker's more general federal retroactivity arguments regarding the *Ring* cutoff should also be rejected

The State fails to substantively engage most of Mr. Booker's more general federal retroactivity arguments regarding the *Ring* cutoff. The State does not even

mention or address Mr. Booker's argument that a retroactivity cutoff at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty. *See* Booker's Resp. at 10-12. The State has therefore abandoned any arguments on this issue. *Cf. Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("[A]n issue not raised in an initial brief is deemed abandoned").

The State offers only a cursory response to Mr. Booker's arguments under the Fourteenth Amendment. According to the State, 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* State's Resp. at 8. The State assumes that "partial" retroactivity is constitutional because it "benefits more appellants," no matter where the line is drawn. *Id.* at 6. Notably, however, the State 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.

The State's failure to address Mr. Booker's Eighth Amendment arguments and cursory treatment of his Fourteenth Amendment arguments is telling. A *Ring* cutoff injects into Florida's death penalty jurisprudence an intolerable level of arbitrariness and capriciousness. It also denies equal protection and due process to a degree not present in typical circumstances where retroactivity is withheld based on the pragmatic necessity to evolve constitutional protections prospectively. A

retroactivity cutoff at *Ring* inaugurates a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

The State's remaining arguments can be dispensed with briefly. The State 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* State's Resp. at 6-7. But as Mr. Booker explained in his earlier response, *see* Booker's Resp. at 18-19, 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. The State unpersuasively attempts to distinguish *Ivan V. v. City of New York*, 407 U.S. 203 (1972). *See* State's Resp. at 5-6. Even assuming, as the State 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").

The State's citation to *Powell, see* State's Resp. at 5-6, is particularly odd considering that the Delaware Supreme Court in *Powell* applied a retroactivity test that mirrors the federal retroactivity test 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 Mr. Booker's arguments.

## V. The State abandons any "harmless error" arguments

The State abandons any argument that the *Hurst* error in Mr. Booker's case was harmless by failing to reference harmless error in the State's response. *See Hoskins*, 75 So. 3d at 257. The *Hurst* error in this 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 Mr. Booker's post-*Apprendi* death sentence and grant relief.

Respectfully submitted,

/s/ Billy H. Nolas

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**CERTIFICATE OF SERVICE**

I certify that on June 12, 2018, the foregoing was served via the e-portal to Assistant Attorney General Lisa Hopkins at capapp@myfloridalegal.com and lisa.hopkins@myfloridalegal.com, and Ann Finnell at afinnell@fmnlawyers.com.

/s/ Billy H. Nolas
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IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN BOOKER,

Defendant.

CASE NO.: 01-1977-CF-002332-A

DIVISION: III





**ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF**

**THIS CAUSE** comes before the Court upon Defendant's "Motion for Postconviction Relief Pursuant to *Hurst v. Florida*," filed June 24, 2016, pursuant to Fla. R. Crim. P. 3.851. Court-appointed counsel adopted the motion, which was originally filed by the Federal Public Defender's Office, on February 15, 2017. The State filed a response to the motion on March 31, 2017. Defendant replied to the State's response on April 18, 2017. On March 7, 2018, a telephonic status conference was held at which the parties stipulated that this Court could rule on the motion as filed based on the Florida Supreme Court's decision in *Booker v. Jones*, 43 Fla. L. Weekly S52 (Fla. Jan. 30, 2018), *reh'g stricken*, SC17-1205 (Fla. Feb. 22, 2018). Upon consideration of the motion, the State's response, Defendant's reply, the Florida Supreme Court's decision in *Booker v. Jones*, and the record, this Court finds and concludes as follows:

## I. PROCEDURAL HISTORY

The relevant facts of the underlying case are as follows:

> On December 2, 1977, the State of Florida charged Booker with first-degree murder, sexual battery, and burglary, all stemming from the November 9, 1977, death of ninety-four-year-old Lorine Demoss Harmon.

> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

*Booker v. State*, 773 So. 2d 1079, 1081–83 (Fla. 2000) (citing *Booker v. State,* 397 So.2d 910, 912 (Fla.), *cert. denied,* 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981)). The procedural history below is adopted from the State's reply:

> The jury returned a verdict finding Booker guilty of first-degree murder, sexual battery, and burglary. After the penalty phase the jury recommended death by a nine-to-three vote. The trial court followed the jury's recommendation, sentencing Booker to death. The trial court found no mitigating circumstances and three aggravating circumstances: (1) Previously convicted of a felony involving the use of threat of violence to another; (2) Committed the murder during the commission of a sexual battery and burglary; and, (3) HAC. *Id.* at 1082 n.1 (Fla. 2000).
>
> Booker's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. *Booker v. State*, 397 So. 2d 910 (Fla. 1981). Booker then filed a petition for writ of certiorari in the United States Supreme Court which the Court denied. *Booker v. Florida*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981).
>
> Subsequently, Booker filed numerous proceedings in State and Federal Court. In particular, Booker filed a petition for writ of habeas corpus which the Florida

Supreme Court found that any error in light of the U.S. Supreme Court's 1987 decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987) was harmless. The Florida Supreme Court upheld Booker's sentence. *Booker v. State*,520 So. 2d 246, 247-249 (Fla. 1988). However, the Eleventh Circuit found that the Hitchcock error was not harmless and the case was remanded for resentencing. *Booker v. Dugger*,922 F.2d 633, 634 (11th Cir. 1991).

A new penalty phase hearing was conducted in March 1998. The jury voted eight-to-four for death. The trial court following the jury's recommendation, sentenced Booker to death. The trial court found four aggravating circumstances: (1) committed the felony while he was under sentence of imprisonment; (2) previously convicted of a violent felony; (3) committed the capital felony while engaged in the commission of a sexual battery and burglary; and, (4) HAC. The trial court found two statutory mitigators: (1) the crime was committed while Booker was under the influence of extreme mental or emotional disturbances; and, (2) Booker's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court found nine nonstatutory mitigating circumstances.

Booker's sentence of death was affirmed on appeal by the Florida Supreme Court. *Booker v. State*,773 So. 2d 1079, 1086 (Fla. 2000). Booker then filed a petition for writ of certiorari that was denied by the United States Supreme Court on May 14, 2001. *Booker v. Florida*, 532 U.S. 1033 (2001).

Booker filed a motion for postconviction relief which was denied by the trial court and affirmed by the Florida Supreme Court. *Booker v. State*, 969 So. 2d 186 (Fla. 2007). On June 24, 2016, Booker represented by Billy Nolas, filed the instant successive motion raising a claim based on the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). This Court appointed Attorney Ann Finnell as lead capital collateral counsel and the capital habeas unit of the public defender's office as co-counsel. Ann Finnell subsequently adopted the successive motion filed on June 24, 2016.

## II. ANALYSIS

Defendant seeks relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, — U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and the Florida Supreme Court's

decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).

In its recent decision in *Hitchcock v. State*, the Florida Supreme Court stated:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *See, e.g., Zack v. State*, —— So.3d ——, 42 Fla. L. Weekly S656, 2017 WL 2590703 (Fla. June 15, 2017); *Marshall v. Jones*, 226 So.3d 211, 2017 WL 1739246 (Fla. May 4, 2017); *Lambrix v. State*, 217 So.3d 977 (Fla. 2017); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); *Bogle v. State*, 213 So.3d 833 (Fla. 2017); *Gaskin v. State*, 218 So.3d 399 (Fla. 2017). Hitchcock is among those defendants whose death sentences were final before *Ring*, and his arguments do not compel departing from our precedent.
>
> 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 to *Ring*. As such, these arguments were rejected when we decided *Asay*.

226 So. 3d 216, 217 (Fla. 2017), *reh'g denied,* SC17-445, 2017 WL 4118830 (Fla. Sept. 18, 2017), and *cert. denied sub nom. Hitchcock v. Florida,* 138 S. Ct. 513 (2017).

On January 30, 2018, the Florida Supreme Court, applying its decision in *Hitchcock*, denied Defendant's petition for writ of habeas corpus, which raised the same claims for relief that he raises in the instant motion. *Booker v. Jones*, 43 Fla. L. Weekly S52 (Fla. Jan. 30, 2018), *reh'g stricken*, SC17-1205 (Fla. Feb. 22, 2018).

In light of the Florida Supreme Court's recent decisions in *Hitchcock* and *Booker*, and the fact that Defendant's death sentence became final on May 14, 2001, when certiorari was denied in *Booker v. Florida*, 532 U.S. 1033 (2001), this Court finds Defendant's claims to be without merit.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

Defendant's motion is hereby **DENIED**. Defendant may appeal this decision to the Florida Supreme Court within thirty (30) days of this Order's effective date.

**DONE AND ORDERED** in Chambers at Gainesville, Alachua County, Florida, on this 8th day of March 2018.

W. E. Davis

**WILLIAM E. DAVIS,**
CIRCUIT JUDGE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true copy of the foregoing Order was furnished by email delivery, on this 8th day of March 2018, to the following:

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