

No. _____

IN THE
Supreme Court of the United States

DAVID MILLER, JR.,

Petitioner,

v.

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

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

Supreme Court of Florida

No. SC17-1211

DAVID MILLER, JR.,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 31, 2018]

PER CURIAM.

David Miller, Jr., 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 Miller’s case pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

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

After reviewing Miller's response to the order to show cause, as well as the State's arguments in reply, we conclude that Miller is not entitled to relief. Miller was sentenced to death following a jury's recommendation for death by a vote of seven to five, and Miller's sentence of death became final in 2001. Miller v. State, 770 So. 2d 1144, 1146 (Fla. 2000). Thus, Hurst does not apply retroactively to Miller's sentence. See Hitchcock, 226 So. 3d at 217. Accordingly, we deny Miller's petition.

The Court having carefully considered all arguments raised by Miller, 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, Duval County,
Case No. 161997CF006680AXXXMA

Christopher J. Anderson of Law Office of Christopher J. Anderson, Neptune Beach, Florida; and Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida,

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EXHIBIT 2

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-1211

Lower Tribunal No(s).:

161997CF006680AXXXMA

DAVID MILLER, JR.

vs. JULIE L. JONES, ETC.

Petitioner(s)

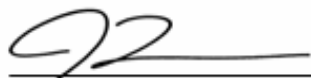
Respondent(s)

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:

BILLY H. NOLAS

JENNIFER ANN DONAHUE

CHRISTOPHER JAMES ANDERSON

EXHIBIT 3

No. SC17-1211

IN THE
Supreme Court of Florida

DAVID MILLER, JR.,

Petitioner,

v.

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

Respondent.

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

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INTRODUCTION

There are 22 Florida cases, including this one, 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

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*. 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. Not allowing such 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

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).

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

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.

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 7-5. 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. Moreover, 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

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).

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

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 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

(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 comports with Sixth Amendment requirements).

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).

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 whose death sentences were finalized in the two years between *Apprendi* and *Ring*. 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

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 shows 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.

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

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

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 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.

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).

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 28, 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 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.*

⁵ In Compliance with this Court’s page-length limit, Petitioner provides only a summary of his previous *Montgomery* arguments here. Petitioner’s more expansive *Montgomery* arguments appear at pages 19-21 of his Petition.

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

In the *Hurst* decisions, 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 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

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); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 340-42 (1816).

CONCLUSION

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. *Id.* at *8. This Florida Supreme Court’s application of federal constitutional protections is not so circumscribed: (“[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”). *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) Secondly, *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.

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.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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.

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EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA

DAVID MILLER, JR.,

Petitioner,

v.

CASE NO. SC17-1211

Lower Tribunal No.

1997CF6680

DEATH PENALTY CASE

JULIE L. JONES, ET AL.,

Respondents.

_____ /

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

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

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STATEMENT OF THE CASE AND FACTS

Petitioner, David Miller, was convicted of first-degree murder and aggravated battery, and was sentenced to death. Miller v. State, 770 So.2d 1144 (2000). The judgment and sentence became final on November 11, 2000, when the time permitted for Petitioner to file a petition for writ of certiorari in the United States Supreme Court expired. Fla. R. Crim. P. 3.851(d)(1)(A) (A judgment and sentence become final "90 days after the opinion becomes final."). This Court affirmed the denial of Petitioner's postconviction motion and denied a previous writ of habeas corpus. Miller v. State, 926 So.2d 1243 (2006).

On June 28, 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. Hitchcock v. State, No. SC17-445, 2017 WL 3431500, *2 (Fla. Aug. 10, 2017). On August 10, 2017, this Court affirmed the conviction and sentence in Hitchcock in accordance with this Court's decision in Asay. 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 12, 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 Miller'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, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than Teague).

Petitioner relies upon Ivan V. and Powell for the premise that Hurst should be retroactive under Teague as a substantive change. (Response at 20); 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 20). 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, 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 it was 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 proceedings. 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. Further, this Court has previously heard and rejected

Petitioner's due process, equal protection, and arbitrariness arguments. See Lambrix v. State, No. SC17-1687, 2017 WL 4320637, *1 (Fla. Sept. 29, 2017). 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, No. SC15-1549, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017); Hitchcock, 2017 WL 3431500 (sentence final in 2000; see Hitchcock v. Florida, 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.

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 Petitioner's claim that this Court has never specifically addressed this "Apprendi gap," this Court has addressed the issue

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 in 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. 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)).

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, 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, 2017 WL 4320637 at *1 (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 11, 2000, 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.

Additionally, Petitioner argues that he "should receive the retroactive benefit of Hurst under this Court's 'fundamental fairness' doctrine." (Response at 9). Though Petitioner raised a Ring claim in his second post-conviction motion in the circuit court, which was denied April 4, 2003, the fundamental fairness doctrine discussed in Mosley does not create a basis for retroactive application of Hurst to pre-Ring cases. See Mosley v. State, 209 So.3d 1248, 1274-75 (Fla. 2016). This Court rejected this argument in Gaskin. Gaskin, 218 So.3d at 401. Gaskin raised the substance of a Hurst claim both at his trial and on direct appeal. Gaskin v. State, 591 So.2d 917, 920 (Fla. 1991). However, this Court held "[b]ecause Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida." Gaskin, 218 So.3d at 401. Like Gaskin, Petitioner is not entitled to retroactive application of Hurst because his judgment and sentence became final pre-Ring.

This Court's rulings in Asay and Hitchcock apply to Petitioner. Petitioner has demonstrated no cause for this Court to recede from its lengthy case precedent. 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 23rd 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: Christopher Anderson, Esq., at chrisaab1@gmail.com, 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 5

No. SC17-1211

IN THE

Supreme Court of Florida

DAVID MILLER, JR.,

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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RECEIVED, 11/06/2017 02:38:26 PM, Clerk, Supreme Court

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 2 (“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), *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017), and *Hannon v. State*, No. SC17-1837, 2017 WL 4944899 (Fla. Nov. 1, 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 on November 11, 2000, see Respondent’s Resp. at 1, after *Apprendi*, 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 5. 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 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 her 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 Petitioner's post-*Apprendi* death sentence and grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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/ Christopher J. Anderson
Christopher J. Anderson

EXHIBIT 6



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FACT SHEET

UPCOMING EXECUTIONS

EXECUTION DATABASE

STATE-BY-STATE

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

061a

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, Phillip 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

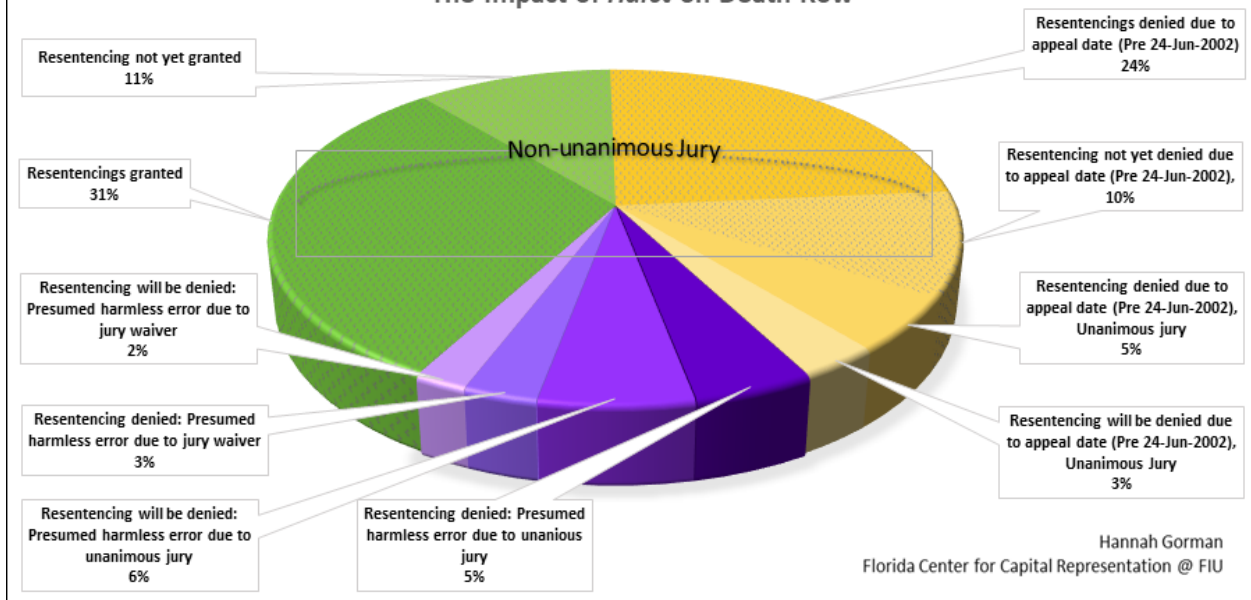


EXHIBIT 7

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

23. *Kokal v. State*, 237 So. 3d 907 (Fla. 2018)
24. *Lucas v. State*, 234 So. 3d 647 (Fla. 2018)
25. *Marquard v. State*, 234 So. 3d 560 (Fla. Jan. 24, 2018)
26. *Sweet v. State*, 234 So. 3d 646 (Fla. 2018)
27. *Taylor v. State*, 234 So. 3d 649 (Fla. 2018)
28. *Thomas v. State*, 234 So. 3d 559 (Fla. 2018)
29. *Trease v. State*, No. SC17-686, 2018 WL 1959603 (Fla. Apr. 26, 2018)
30. *Anderson v. State*, 235 So. 3d 277 (Fla. 2018)
31. *Finney v. State*, 235 So. 3d 279 (Fla. 2018)
32. *Hartley v. State*, 237 So. 3d 908 (Fla. 2018)
33. *Jeffries v. State*, 235 So. 3d 283 (Fla. 2018)
34. *Kelley v. State*, 235 So. 3d 280 (Fla. 2018)
35. *Lightbourne v. State*, 235 So. 3d 285 (Fla. 2018)
36. *Morris v. State*, 236 So. 3d 324 (Fla. 2018)
37. *Stewart v. State*, 235 So. 3d 798 (Fla. 2018)
38. *Trepal v. State*, 235 So. 3d 281 (Fla. 2018)
39. *Trotter v. State*, 235 So. 3d 284 (Fla. 2018)
40. *Bell v. State*, 235 So. 3d 287 (Fla. 2018)
41. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018)
42. *Brown v. State*, 235 So. 3d 289 (Fla. 2018)
43. *Davis v. State*, 235 So. 3d 295 (Fla. 2018)
44. *Foster v. State*, 235 So. 3d 290 (Fla. 2018)
45. *Foster v. State*, 235 So. 3d 294 (Fla. 2018)

46. *Fotopoulos v. State*, 237 So. 3d 911 (Fla. 2018)
47. *Gamble v. State*, 235 So. 3d 288 (Fla. 2018)
48. *Jennings v. State*, 237 So. 3d 909 (Fla. 2018)
49. *Long v. State*, 235 So. 3d 293 (Fla. 2018)
50. *Booker v. Jones*, 235 So. 3d 298 (Fla. 2018)
51. *Davis v. Jones*, 235 So. 3d 301 (Fla. 2018)
52. *Gudinas v. State*, 235 So. 3d 303 (Fla. 2018)
53. *Lamarca v. State*, 237 So. 3d 914 (Fla. 2018)
54. *Mendoza v. State*, 235 So. 3d 302 (Fla. 2018)
55. *Occhicone v. State*, 235 So. 3d 299 (Fla. 2018)
56. *Pace v. State*, 237 So. 3d 912 (Fla. 2018)
57. *Rogers v. State*, 235 So. 3d 306 (Fla. 2018)
58. *Sochor v. State*, 235 So. 3d 304 (Fla. 2018)
59. *Whitfield v. State*, 235 So. 3d 297 (Fla. 2018)
60. *Consalvo v. State*, 235 So. 3d 307 (Fla. 2018)
61. *Gordon v. State*, 235 So. 3d 311 (Fla. 2018)
62. *Krawczuk v. State*, 237 So. 3d 915 (Fla. 2018)
63. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018)
64. *Nelson v. State*, 235 So. 3d 308 (Fla. 2018)
65. *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018)
66. *Sireci v. State*, 237 So. 3d 916 (Fla. 2018)
67. *Sliney v. State*, 235 So. 3d 310 (Fla. 2018)
68. *Stein v. State*, 237 So. 3d 919 (Fla. 2018)

69. *Whitton v. State*, 238 So. 3d 724 (Fla. 2018)
70. *Damren v. State*, 236 So. 3d 230 (Fla. 2018)
71. *Derrick v. State*, 236 So. 3d 231 (Fla. 2018)
72. *Griffin v. State*, 236 So. 3d 237 (Fla. 2018)
73. *Hodges v. State*, 236 So. 3d 241 (Fla. 2018)
74. *Johnson v. State*, 236 So. 3d 232 (Fla. 2018)
75. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018)
76. *Melton v. State*, 236 So. 3d 234 (Fla. 2018)
77. *Morton v. State*, 236 So. 3d 242 (Fla. 2018)
78. *Overton v. State*, 236 So. 3d 238 (Fla. 2018)
79. *Pietri v. State*, 236 So. 3d 235 (Fla. 2018)