

No. _____

IN THE
Supreme Court of the United States

ROBERT JOE LONG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S APPENDIX

ROBERT A. NORGARD
Norgard, Norgard, & Chastang
310 East Main Street
Bartow, Florida 33830
Tallahassee, Florida 32301
(863) 354-0508
Norgardlaw@verizon.net
(850) 942-8818

BILLY H. NOLAS
Counsel of Record
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
billy_nolas@fd.org

INDEX TO APPENDIX

Exhibit 1 — Florida Supreme Court Opinion Below (Jan. 29, 2018)	1a
Exhibit 2 — Florida Supreme Court Order to Show Cause (Sep. 25, 2017)	5a
Exhibit 3 — Hillsborough County Circuit Court Order Denying Relief (Apr. 27, 2017).....	7a
Exhibit 4 — Petitioner/Appellant’s Response to Order to Show Cause (Oct. 16, 2017)	14a
Exhibit 5 — Respondent/State’s Response to Order to Show Cause (Oct. 26, 2017)	38a
Exhibit 6 — Petitioner/Appellant’s Reply in Support of Response to Order to Show Cause (Nov. 6, 2017)	55a
Exhibit 7 — Florida Death Penalty Appeals Decided in Light of <i>Hurst</i> (Source: Death Penalty Information Center).....	68a
Exhibit 8 — List of Florida Supreme Court Opinions Summarily Denying Relief in Light of <i>Hitchcock</i> (Jan.–Feb. 2018).....	78a

EXHIBIT 1

Florida Supreme Court Opinion Below
(Jan. 29, 2018)

Supreme Court of Florida

No. SC17-942

ROBERT JOE LONG,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 29, 2018]

PER CURIAM.

We have for review Robert Joe Long's appeal of the circuit court's order denying his motion filed pursuant to Florida Rule of Criminal Procedure 3.851.

This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

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

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

After reviewing Long's response to the order to show cause, as well as the State's arguments in reply, we conclude that Long is not entitled to relief. Long was sentenced to death following a jury's unanimous recommendation for death. Long v. State, 610 So. 2d 1268, 1269 (Fla. 1992). His sentence of death became final in 1993. Long v. Florida, 510 U.S. 832 (1993). Thus, Hurst does not apply retroactively to Long's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Long's motion.

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

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

PARIENTE, J., concurring in result.

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

An Appeal from the Circuit Court in and for Hillsborough County,

Michelle Sisco, Judge - Case No. 291984CF013346000AHC

Robert Anthony Norgard of Norgard, Norgard & Chastang, P.A., Bartow, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Stephen D. Ake, Assistant Attorney
General, Tampa, Florida,

for Appellee

EXHIBIT 2

Florida Supreme Court Order to Show Cause
(Sep. 25, 2017)

Supreme Court of Florida

MONDAY, SEPTEMBER 25, 2017

CASE NO.: SC17-942

Lower Tribunal No(s):
291984CF013346000AHC

ROBERT JOE LONG

vs. STATE OF FLORIDA

Appellant(s)

Appellee(s)

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

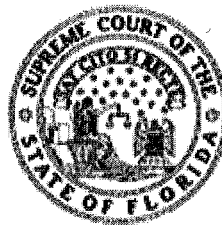
Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



ks

Served:

STEPHEN D. AKE
ROBERT ANTHONY NORGDARD

EXHIBIT 3

Hillsborough County Circuit Court Order
Denying Relief (Apr. 27, 2017)

**IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division**

STATE OF FLORIDA

CASE NO.: 84-CF-013346

v.

ROBERT JOE LONG,
Defendant.

DIVISION: J

**ORDER DENYING DEFENDANT'S SECOND SUCCESSIVE
POSTCONVICTION MOTION**

THIS MATTER is before the Court on Defendant's Second Successive Postconviction, filed on January 3, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 23, 2017, the State filed its response to Defendant's motion and, on February 21, 2017, the Court held a case management conference. Defendant's claims are purely legal and do not require an evidentiary hearing. After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the February 21, 2017, case management conference, the Court finds as follows.

A jury found Defendant pleaded guilty to first degree murder among other charges. Following a penalty phase, the jury recommended a sentence of death by a unanimous vote of twelve to zero. On direct appeal the sentence of death was reversed and the case remanded for a new penalty phase. *See Long v. State*, 529 So. 2d 286 (Fla. 1988). Following a new penalty phase, the jury again recommended a sentence of death by a unanimous vote of twelve to zero. The trial court imposed a death sentence. The Florida Supreme Court affirmed Defendant's conviction and death sentence. *See Long v. State*, 610 So. 2d 1268 (Fla. 1992). The United States Supreme Court denied Defendant's petition for writ of certiorari on October 4, 1993. *See Long v. Florida*, 510 U.S. 832 (1993).

Defendant filed two motions for postconviction relief, which were subsequently denied, and the Florida Supreme Court affirmed the denials. *See Long v. State*, 118 So. 3d 798 (Fla. 2013); *See also Long v. State*, 183 So. 2d 342 (Fla. 2016).

In this successive motion, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, No. SC14-436 and No. SC14-2108, 2016 WL 7406506 (Fla. December 22, 2016), and *Asay v. State*, 2016 WL 7406538, No. SC16-223, No. SC16-102, No. SC16-628, 2016 WL 7406538 (Fla. December 22, 2016), and the enactment of Chapter 2016-13, Law of Florida. Defendant requests that the Court vacate his death sentence and grant a new penalty phase or sentence him to life in prison.

CLAIM I

MR. LONG'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SHOULD BE VACATED

In claim I, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth and Eighth Amendments of the United States Constitution. Defendant asserts *Hurst v. Florida* should be applied retroactively to his case under the *Witt*¹ analysis as well as principles of fundamental fairness. Defendant contends considerations of fairness and uniformity require retroactive application of *Hurst*, and he cites to numerous defendants whose crimes were committed before his own, but will still receive the benefit of *Hurst* because their convictions or death sentences were vacated for other reasons. Defendant cites to the dissenting opinion of Justice Lewis in *Asay* and to *James v. State*, 615 So. 2d 668 (Fla. 1993), arguing that the retroactivity of

¹ *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

Hurst should be extended to those defendants who, prior to *Ring*², properly asserted, presented, and preserved *Ring*-type errors (regardless of when their death sentences became final).

Defendant further asserts that in *Hurst v. State*, the Florida Supreme Court held the Eighth Amendment requires jury unanimity in recommending a death sentence. Defendant further asserts that failure to properly inform the jury of its role violates the Eighth Amendment, and cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant argues that failure to properly instruct the jury in this case violates the Eighth Amendment, and reflects *Hurst* error is not harmless here. Defendant also asserts the State cannot establish beyond a reasonable doubt any *Hurst* error was harmless here.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State contends a reasonable reading of *Mosley*, *Asay* and *Gaskin v. State*, No. SC15-1884, 2017 WL 224772 (Fla. January 19, 2017) reflect that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to Defendant's case. The State asserts that a dissenting opinion is not binding precedent and the Court is bound by the ruling of the majority. The State further contends it does not bear the burden of proving harmless error, and any *Hurst* error here is harmless. The State requests that the Court summarily deny claim I.

The Court finds the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final at the time of *Ring*.³ See *Asay*, 2016 WL 7406538, at *4-13 (conducting a retroactivity analysis and concluding that *Hurst* should not be applied to defendant's case, which became final before *Ring*); *Mosley*, 2016 WL 7406506, at *18 ("[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants

² *Ring v. Arizona*, 536 U.S. 584 (2002).

³ *Ring* was decided on June 24, 2002. See *Ring*, 536 U.S. at 584.

whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."); *Gaskin*, 2017 WL 224772, at *2 (citing *Asay* and finding defendant is not entitled to relief under *Hurst v. Florida* because his sentence became final in 1993); *Bogle v. State*, No. SC11-2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not "entitled to *Hurst* relief because *Hurst* does not apply to retroactively to cases that were final before *Ring* was decided."); *Davis v. State*, No. SC16-264, 2017 WL 656307, *2 (Fla. February 17, 2017) (citing *Asay* and denying defendant's *Hurst v. Florida* claim); *Lambrix v. State*, SC16-8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

Here, Defendant's sentence became final when the United State Supreme Court denied certiorari on October 4, 1993. See Fla. R. Crim. P. 3.851(d)(1)(B) ("For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to the instant case.⁴ No relief is warranted on claim I.

CLAIM II

MR. LONG'S MUST BE SENTENCED TO LIFE

In claim II, Defendant asserts that he should be sentenced to life pursuant to the plain language of Section 775.082(2)⁵, Florida Statutes, which states that in the event the death penalty

⁴ Because the *Hurst* decisions are not retroactively applicable to Defendant's case, the Court does not further address the issue of harmless error.

⁵ Defendant cites to Section 775.082(5), Florida Statutes, but based on his argument it appears to the Court that he is referring to Section 775.082(2).

is held to be unconstitutional the court shall resentence any defendant previously sentenced to death to a life sentence.

In its response, the State asserts that this provision only applies if capital punishment as a penalty is found to be unconstitutional. The State asserts that that has clearly not happened here, citing to the Florida Supreme Court's explanation of such in *Perry* and *Hurst v. State*. The State asserts that the Florida Supreme Court has consistently rejected similar claims.

The Court finds that the court in *Hurst v. State* explicitly stated that, "section 775.082(2) does not require commutation to life under the holding of *Hurst v. Florida*, which did *not* invalidate death as a penalty." See *Hurst v. State*, 202 So. 3d at 66 (emphasis added). **No relief is warranted on Claim II.**

CLAIM III

MR. LONG'S IS ENTITLED TO A NEW PENALTY PHASE

In claim III, Defendant asserts that he is entitled to a new penalty phase because he was tried under a death penalty statute that has been held to be unconstitutional. Defendant contends that the denial of a new penalty phase deprives him of a fair and impartial trial, effective assistance of counsel, due process, and freedom from cruel and unusual punishment under both the Florida the United States Constitutions.

In its response, the State asserts that Defendant has cited to no legal authority which would require the Court to grant Defendant's requested relief.

As previously discussed in claim I above, the *Hurst* decisions do not retroactively apply to Defendant's case. **No relief is warranted on claim III.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's Second Successive Postconviction Motion is hereby **DENIED**.

Defendant has thirty (30) days from the rendition of this Order within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of April, 2017.

ORIGINAL SIGNED
APR 27 2017
MICHELLE SISCO
Circuit Judge
MICHELLE SISCO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Robert Norgard, Esquire, Norgard, Norgard & Chastang, P.O. Box 811, Bartow, Florida 33813; Stephen D. Ake, Esquire, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607; Jay Pruner, Esquire, Office of the State Attorney, 419 North Pierce Street, Tampa, FL 33602, by U.S. mail, on this 27th day of April, 2017.

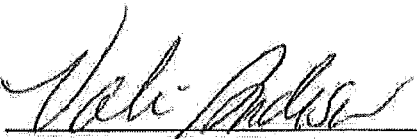

Deputy Clerk

EXHIBIT 4

Petitioner/Appellant's Response
To Order to Show Cause (Oct. 16, 2017)

No. SC17-942

IN THE
Supreme Court of Florida

ROBERT JOE LONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**APPELLANT'S RESPONSE TO
SEPTEMBER 25, 2017 ORDER TO SHOW CAUSE**

Robert A. Norgard
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863) 533-8556
Counsel for Appellant

RECEIVED, 10/16/2017 01:28:34 PM, Clerk, Supreme Court

TABLE OF CONTENTS

INTRODUCTION.....	1
REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING	1
ARGUMENT.....	2
I. Appellant’s death sentence violates <i>Hurst</i>	2
II. This Court’s “retroactivity cutoff” at <i>Ring</i> is unconstitutional and should not be applied to Appellant.....	3
A. This Court’s retroactivity cutoff violates the Eighth and Fourteenth Amendments’ prohibition against arbitrary and capricious imposition of the death penalty.....	4
B. This Court’s retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process.....	8
III. Because the <i>Hurst</i> 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.....	10
A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.....	10
B. The <i>Hurst</i> decisions announced substantive rules that must be applied retroactively to Appellant under the Supremacy Clause.....	12
C. The “harmless error” doctrine does not preclude <i>Hurst</i> relief.....	15
CONCLUSION.....	20

INTRODUCTION

Mr. Long's death sentence was imposed pursuant to a capital 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). A core issue in this case is whether this Court should apply its "retroactivity cutoff" to deny Mr. Long *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).

This Court has created a state-law retroactivity cutoff at the date *Ring* was decided—June 24, 2002. The cutoff is unconstitutional and should not be applied to Mr. Long. Denying Mr. Long *Hurst* relief because his sentence became final in 1993, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.¹

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Mr. Long respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Long also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.²

¹ Relief should not be denied here in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Appellant notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

² Depriving Mr. Long full briefing would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*,

ARGUMENT

I. Appellant's death sentence violates *Hurst*

Mr. Long 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 Supreme Court held that the jury, not the judge, must make the findings 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

170 So. 3d 731, 733 (Fla. 2015); *see also* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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. Mr. Long'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 generalized recommendation for death. The record does not reveal whether Mr. Long'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.

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

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. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL

3431500 (Fla. Aug. 10, 2017). The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Mr. Long the relief being granted in scores of materially indistinguishable collateral cases. Denying Mr. Long *Hurst* retroactivity because his death sentence became final in 1993, 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.³

A. 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[d] 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.*

³ This Court is obligated to meaningfully 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").

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;⁴ 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;⁵ whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener’s error

⁴ See, e.g., *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*)[Docket].

⁵ Compare dockets of *Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (opinion issued within one year after briefing completed, before *Ring*), with *Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted).

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' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, 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 other side of this Court's current retroactivity cutoff and was denied relief.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court’s date-of-*Ring*-based retroactivity approach include whether a resentencing based on relief was granted in older cases. Under the Court’s current approach, some old cases with a post-*Ring* resentencing are subject to *Hurst*, while other 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 ten-year delay before the trial). Under this Court’s approach, a defendant who was originally sentenced to death before Mr. Long, and who was again later resentenced to death after *Ring*, would receive *Hurst* relief and Mr. Long would not.

B. 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 becomes “whether there is some ground of difference that rationally explains 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 must be strictly scrutinized. Capital defendants have a fundamental right to a reliable determination of their sentences. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between those capital 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. This Court’s *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest.

As a due process matter, denying the benefit of Florida’s new post-*Hurst* capital sentencing statute to “pre-*Ring*” defendants like Mr. Long 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 v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v.*

Wainwright, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority 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 necessary to implement a substantive guarantee 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. 399, 428-29 (O'Connor, J., concurring); *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). Instead, 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 346 (O'Connor, J., concurring). 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 Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring).

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

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review

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

substantive constitutional right that determines the outcome of that challenge,” *id.* at 731-32.

The Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had “a procedural component.” *Id.* at 734. *Miller* did “not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*.” *Miller*, 567 U.S. at 483. Instead, “it mandate[d] only that a sentence follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.* Despite *Miller*’s procedural mandates, the Court in *Montgomery* warned against “conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish,” *id.* at 735, and that the necessary procedures do not “transform substantive rules into procedural ones,” *id.*

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

The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Long by this Court under the Supremacy Clause. First, a Sixth

Amendment rule was established requiring that a jury find as fact: (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. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. See *Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

Second, an Eighth Amendment rule was established that requires the elements to be found unanimously by the jury. The substantive nature of the unanimity rule is apparent from 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.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders “beyond the State’s power to punish,” *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable fact-finding procedures could not legitimize 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).

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

a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”).

IV. The “harmless error” doctrine does not preclude *Hurst* relief

The “harmless error” doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury’s unanimous recommendation to sentence Mr. Long to death.⁶ This Court’s per se rule that *Hurst* errors are harmless in every case where the pre-*Hurst* jury unanimously recommended death, *see, e.g., Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Mr. Long’s jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law. This Court cannot reliably infer from the jury’s recommendation whether the jury unanimously found all the other requisite elements for a death sentence. There is a reasonable probability that individual

⁶ *Hurst* errors should be deemed “structural” and not subject to harmless review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. *Hurst* errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and “deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination” of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

jurors based their overall recommendation for death on a different underlying calculus. *See Hall v. State*, 212 So. 3d 1001, 1037 (Quince, J., dissenting).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Mr. Long's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. Without the *Hurst* error, where the jury was properly apprised of its fact-finding role, there is a reasonable likelihood that it would have afforded greater weight to Mr. Long's mitigation. As such, the Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding.⁷ *Cf. Mills v.*

⁷ Proper judicial review measures the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated in *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court explained that the proper standard is whether there is a "reasonable

Maryland, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in mitigation context Eighth Amendment is violated when there is uncertainty about jury's vote).

The jury's recommendation in Long's case also does not account for the possibility that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation at the penalty phase would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty. Counsel's approach to the mitigation surely would have differed had counsel known that the jury would render the findings regarding the weight of aggravation and mitigation. Just as surely, counsel would have given different advice to Mr. Long about the penalty phase. .

The jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the *court's own* findings on those elements. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life."); Fla. Stat. §

likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380.

921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, “the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.”).

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

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how

inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. In Mr. Long's case too, any reliance on his advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that “the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” 508 U.S. at 278. “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida's pre-*Hurst* jury determinations, including

the advisory recommendation in Mr. Long's case, did not incorporate the beyond-a-reasonable-doubt standard.

To the extent any of the aggravators applied to Mr. Long were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. 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. *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*").

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Long and this case be remanded to the circuit court for a new penalty phase or the imposition of a life sentence.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGDARD

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General at capapp@myfloridalegal.com.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Response is New Time Roman 14 in compliance with Fla. R. App. P. 9.210.

/s/Robert A. Norgard
Robert A. Norgard
Norgard, Norgard & Chastang
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863) 533-8556
Fax (753)533-1334

Norgardlaw@verizon.net
Fla. Bar No.: 322059
Counsel for Appellant

EXHIBIT 5

Respondent/State's Response
To Order to Show Cause (Oct. 26, 2017)

IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG,

Appellant,

v.

CASE NO. SC17-942
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

STATE OF FLORIDA'S REPLY TO SEPTEMBER 25, 2017
ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and submits this reply to Appellant's Response to this Court's September 25, 2017, Order to Show Cause. Pursuant to this Court's precedent in Asay v. State, 210 So. 3d 1 (Fla. 2016), and Hitchcock v. State, Case No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), Long is not entitled to any Hurst relief because his sentence became final in 1993, almost a decade prior to the issuance of Ring v. Arizona, 536 U.S. 584 (2002). This Court has repeatedly rejected the constitutional arguments Long presents in his response, and this Court should once again follow its well-established precedent and affirm the lower court's denial of the successive postconviction motion.

RECEIVED, 10/26/2017 09:33:29 AM, Clerk, Supreme Court

STATEMENT OF THE CASE AND FACTS

This case involves Long's conviction and death sentence for the murder of Michelle Simms. On September 23, 1985, Long plead guilty to this murder, along with seven other cases, each case involving a charge of first degree murder, kidnapping, and sexual battery. Pursuant to the plea agreement, Long would receive life sentences on all the cases with the exception of the instant case, and the State would be allowed to seek the death penalty only in the case involving victim Michelle Sims. Long v. State, 529 So. 2d 286, 288 (Fla. 1988). Long was convicted of all offenses and sentenced to death for the Simms' murder. This Court affirmed his convictions, but reversed his death sentence and remanded for a new penalty phase proceeding. Id.

At the new penalty phase proceeding in 1989, the State introduced evidence regarding Long's prior convictions for kidnapping, robbery, and sexual battery; all of which occurred prior to his September 1985 plea agreement. Long v. State, 610 So. 2d 1268, 1270-71 (Fla. 1992). After the jury unanimously recommended the death penalty, the trial court followed the jury's recommendation and sentenced Long to death. On resentencing appeal, this Court affirmed Long's death sentence, Long v. State, 610 So. 2d 1268, 1269 (Fla. 1992), and his

convictions and death sentence became final when the United States Supreme Court denied his petition for writ of certiorari on October 4, 1993. Long v. Florida, 510 U.S. 832 (1993).

On January 3, 2017, Long filed the instant second¹ successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 challenging his death sentence based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The circuit court summarily denied Long's motion because Hurst does not apply retroactively to defendants, like Long, whose death sentences became final prior to the issuance of Ring v. Arizona, 536 U.S. 584 (2002). Long appealed, and on September 22, 2017, this Court issued an order requiring Appellant to show cause why the trial court's order should not be affirmed in light of Hitchcock v. State, Case No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). On October 16, 2017, Long filed his response to the order to show cause.

ARGUMENT

Under this Court's well-established controlling precedent, Hurst is not retroactively applicable to Long because his death sentence became final in 1993. Long v. State, 610 So. 2d 1268

¹ See Long v. State, 118 So. 3d 798 (Fla. 2013) (affirming the denial of postconviction relief); Long v. State, 183 So. 3d 342 (Fla. 2016) (affirming the denial of Long's first successive postconviction motion).

(Fla. 1992), cert. denied, 510 U.S. 832 (1993). In Asay v. State, 210 So. 3d 1, 11-22 (Fla. 2016), cert. denied, 2017 WL 1807588 (Aug. 24, 2017), this Court held that any capital defendant whose death sentence was final before June 24, 2002, the date the United States Supreme Court issued its decision in Ring v. Arizona, 536 U.S. 584 (2002), was not entitled to Hurst relief. This Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), which provides "*more expansive retroactivity standards* than those adopted in Teague,"² which enumerates the federal retroactivity standards. Asay, 210 So. 3d at 15-16 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than Teague).

This Court reaffirmed its Asay holding in Hitchcock v. State, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017), and rejected several constitutional challenges to its non-retroactivity rule. Opposing counsel in his response to the order to show cause makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in Hitchcock, and more recently in the death

² Teague v. Lane, 489 U.S. 288 (1989).

warrant litigation of Asay v. State, 224 So. 3d 695, 702-03 (Fla. 2017) (Asay VI) (denying an Eighth Amendment challenge to the holding in Asay), and Lambrix v. State, SC17-1687, 2017 WL 4320637 at *1 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in Asay citing Hitchcock and Asay VI). This Court should again reject these various constitutional challenges as they are "nothing more than arguments that Hurst v. State should be applied retroactively to [Appellant's] sentence, which became final prior to Ring." Hitchcock, 42 Fla. L. Weekly S753.³

Furthermore, this Court has explicitly followed Asay in numerous capital cases which are now final. See, e.g., Bogle v. State, 213 So. 3d 833, 855 (Fla. 2017) (denying Hurst relief citing Asay); Lambrix v. State, 217 So. 3d 977, 989 (Fla. Mar. 9, 2017), rehearing denied, SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying Hurst relief citing Asay); Lukehart v. Jones, 2017 WL 1033691 (Fla. Mar. 17, 2017) (relying on Asay to deny Hurst relief); Oats v. Jones, 2017 WL 2291288 (Fla. May 25, 2017) (denying Hurst relief based on Asay); Rodriguez v. State, 219 So. 3d 751, 760 (Fla. 2017), rehearing denied, SC15-1795,

³ The Eleventh Circuit Court of Appeals has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule in Lambrix v. Secretary, Fla. Dept. of Corr., ___ F.3d ___, 2017 WL 4416205 (11th Cir. Oct. 5, 2017) (No. 17-14413), cert. denied, Lambrix v. Jones, 2017 WL 4456332 (Oct. 5, 2017).

2017 WL 2598492 (Fla. June 15, 2017) (denying Hurst relief based on Asay). This Court recently reaffirmed that holding yet again in several cases, including in two active death warrant cases. Jones v. State, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017) (denying Hurst relief based on Asay); Asay VI, 224 So. 3d at 702-03 (same, during active warrant); Lambrix v. State, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017) (same, during active warrant). Thus, this Court has repeatedly and consistently held in numerous capital cases, including active death warrant cases, that Hurst does not apply retroactively to murderers whose death sentences were final prior to the decision in Ring. Asay is firmly established precedent; Asay and Hitchcock control the resolution of this matter.

While Appellant insists that Hurst is retroactive under federal law, it is not. The United States Supreme Court has held that Ring was not retroactive. Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity established in Teague v. Lane, 489 U.S. 288 (1989), to find that Ring, which announced a new procedural rule, does not apply retroactively to death penalty cases already final on direct review). If a case is not retroactive under the broader Witt test, which this Court used in Asay, it is certainly not retroactive under the narrower federal test for retroactivity in

Teague. See Asay, 210 So. 3d at 15 (describing the Witt test as "more expansive" than Teague) (citing Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). See also Lambrix v. Secretary, Fla. Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) (holding that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review"); Lambrix v. Secretary, Fla. Dept. of Corr., ___ F.3d ___, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017) (concluding this Court's holding in Asay to be "fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro"), cert. denied, Lambrix v. Jones, 2017 WL 4456332 (Oct. 5, 2017). Hurst v. State is not retroactive under federal law.

Appellant argues that this Court violated federal retroactivity standards, and the Supremacy Clause, in determining the changes to Florida's capital punishment to be partially retroactive. However, the United States Supreme Court has repeatedly held that certain matters are not retroactive, including in the capital context and including Ring itself, which was a Sixth Amendment right-to-a-jury-trial case. Schriro v. Summerlin, 542 U.S. 348 (2004). In fact, the United States Supreme Court, itself, has given partial retroactive effect to a change to the penal law. See United States v. Abney, 812 F.3d 1079, 1098 (D.C. 2016) ("Prior to its decision in Dorsey, the

Supreme Court 'never held any change in a criminal penalty to be partially retroactive'). In Dorsey v. United States, 567 U.S. 260 (2012), the court held the Fair Sentencing Act to be partially retroactive to those offenders who committed offenses prior to the effective date of the act but were sentenced after that date.

Appellant argues that this Court created a new substantive rule in Hurst v. State, and cites Welch v. United States, 136 S. Ct. 1257 (2016), as support. However, the United States Supreme Court in Welch certainly did not overrule Summerlin. In fact, the Welch decision supports the determination that the new Hurst rule is procedural:

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id., at 351-352, 124 S. Ct. 2519 (citation omitted); see Montgomery, supra, at ---, 136 S. Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Schriro, 542 U.S., at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." Ibid. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Id., at 352, 124 S. Ct. 2519.

Id. at 1264-65. The Welch court found that the rule in Johnson v. United States, 135 S. Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act", was a substantive, rather than procedural, change because it altered the class of people affected by the law. Welch, 136 S. Ct. at 1265. In explaining how the rule in Johnson was not procedural, the Welch court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, ibid., or regulate the evidence that the court could consider in making its decision." Welch, 135 S. Ct. at 1265 (citation omitted). Here, the new Hurst rule allocated the decision-making authority to determine aggravators from the judge to the jury, which is precisely how the Welch court defined a procedural change. Based on United States Supreme Court precedent, there can be no doubt that the Hurst rule is a procedural rule.

Nevertheless, Appellant claims that Hurst v. State should be retroactive because the decision addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right. However, Florida law has required that the State prove the aggravating circumstances at the beyond-a-reasonable-doubt standard of proof for decades. Williams v. State, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating

circumstance); Aguirre-Jarquin v. State, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt); Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt"). And the standard jury instructions for capital cases informs the jury that the standard of proof for aggravators is beyond a reasonable doubt. The "retroactivity" of the beyond-a-reasonable-doubt-standard of proof is a non-issue in this case (and other Florida capital cases as well).

The United States Supreme Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. Danforth v. Minnesota, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is welcome to employ a partial retroactivity approach without violating the federal constitution under Danforth. The state retroactivity doctrine employed by this Court did not violate federal retroactivity standards. This Court's expansion in Hurst v. State is only applicable to defendants in Florida, and, consequently, subject to retroactivity analysis under Witt v. State, 387 So. 2d 922 (Fla. 1980). This Court has characterized the violation of the

right-to-a-jury-trial as procedural, not substantive. State v. Fleming, 61 So. 3d 399, 403 (Fla. 2011) (characterizing the Florida Supreme Court holding in Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005), that Apprendi was not retroactive as having "analyzed Apprendi under the Witt factors and concluded that the new Apprendi rule of procedure did not apply retroactively") (emphasis added). Under Witt, this Court found retroactive application applies to those death sentences which were made final after the United States Supreme Court's decision in Ring. Asay v. State, 210 So. 3d 1 (Fla. 2016). Consistent with Apprendi and Ring, Hurst v. Florida is not retroactive under federal law, and Hurst v. State is retroactive under state law only.

Appellant argues that the failure to employ a full retroactive application of Hurst v. State means that the death sentence is being imposed in a capricious and arbitrary manner. Essentially, the argument is that there is no meaningful distinction based on the culpability and severity of offense, rather, it is based on the mere date Ring was issued. However, Appellant disregards the fact that all offenders on death row were placed there after determination of guilt, through plea or trial, of first-degree murder, beyond a reasonable doubt; therefore, each and every one of the offenders was found

culpable for the most severe of all criminal offenses. Because the constitutional constructs of the past permitted the judge to make the final determination that an aggravator was found beyond a reasonable doubt does not invalidate that finding, thus qualifying the offender to be punished by death. This Court's retroactive application of Hurst v. Florida did not create a capital punishment scheme that is arbitrary and capricious. Rather, it has systematically afforded the class of offenders whose capital conviction was not final prior to the new constitutional rule born in Ring, to be resentenced in accordance with Ring/Hurst v. Florida. Because Appellant's sentence was final when Ring issued, he was not entitled to a resentencing under either a state or federal retroactivity analysis.

Appellant's argument for a violation of the Equal Protection Clause fares no better than the Eighth Amendment argument. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" Lawrence v. Texas, 539 U.S. 558, 579 (2003). A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) ("A criminal defendant

alleging an equal protection violation must prove the existence of purposeful discrimination"). A "[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." McClesky, 481 U.S. at 298.

Although Hurst is clearly not retroactively applicable to Appellant's case, even if it were, the trial court's ruling should still be affirmed because any error was harmless given the jury's unanimous recommendation for death. In order to be harmless error, there must be no reasonable possibility that the Hurst error contributed to Long's death sentence. In Davis v. State, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." In the instant case, the jury unanimously recommended that death was the appropriate sentence, and such a recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of

death." Id. at 175.

This Court has consistently followed Davis and found harmless error in cases involving unanimous recommendations. See King v. State, 211 So. 3d 866 (Fla. 2017); Kaczmar v. State, No. SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017); Knight v. State, Nos. SC14-1775, SC15-1233, 2017 WL 411329 (Fla. Jan. 31, 2017); Truehill v. State, 211 So. 3d 930 (Fla. 2017), cert. denied, 2017 WL 2463876 (Oct. 16, 2017); Hall v. State, 212 So. 3d 1001 (Fla. 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Guardado v. Jones, No. SC17-389, 2017 WL 1954984 (Fla. May 11, 2017); Cozzie v. State, No. SC13-2393, 2017 WL 1954976 (Fla. May 11, 2017). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, the State urges this Court to affirm the trial court's denial of Long's Hurst claims.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Long relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Stephen D. Ake
STEPHEN D. AKE
Senior Assistant Attorney General
Florida Bar No. 0014087
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [and]
stephen.ake@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October 2017, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Robert A. Norgard at **norgardlaw@verizon.net**, Norgard, Norgard & Chastang, P.O. Box 811, Bartow, Florida 33831.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Stephen D. Ake

COUNSEL FOR APPELLEE

EXHIBIT 6

Petitioner/Appellant's Reply in Support of
Response to Order to Show Cause (Nov. 6, 2017)

No. SC17-942

IN THE
Supreme Court of Florida

ROBERT JOE LONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**APPELLANT'S REPLY IN SUPPORT OF RESPONSE TO
SEPTEMBER 25, 2017 ORDER TO SHOW CAUSE**

Robert A. Norgard
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863) 533-8556
Norgardlaw@verizon.net
Fla. Bar No. 322059

Counsel for Appellant

RECEIVED, 11/06/2017 11:13:29 AM, Clerk, Supreme Court

ARGUMENT

I. The State is incorrect that the state-law *Witt* test is the only retroactivity doctrine this Court need follow

The State incorrectly asserts that this Court used the appropriate test for retroactivity in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), where it applied the state-law-based retroactivity test from *Witt v. State*, 387 So. 2d 922 (Fla. 1980), to hold that *Hurst* is not retroactive to any defendant whose conviction was final when the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). While states are permitted to develop their own retroactivity doctrines, they must still abide by federal constitutional requirements. The United States Supreme Court made clear in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), “when 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.” *Id.* at 729. Here, as Mr. Long explained in his initial response, *Hurst* was a substantive new rule that requires retroactive effect. *See* Appellant’s Response, p.14.

II. The State is incorrect that prior decisions by this Court and the Eleventh Circuit already addressed Appellant’s federal retroactivity arguments

The State is incorrect in its claim that both state and federal courts have already rejected Mr. Long’s federal retroactivity arguments.

The State erroneously suggests that Appellant constitutional arguments

have already been rejected in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), and *Asay*. See State's Resp. at 4-5. This Court's decision in *Hitchcock* did not explicitly address or reject *any* of the federal retroactivity arguments in Mr. Bell's response to the order to show cause. See Appellant's Resp. at 3-15.

This Court's opinion in *Hitchcock* relied exclusively on the reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). As the State acknowledges, the Court's decision in *Asay* rested entirely on the state retroactivity law articulated in *Witt*. See State's Resp. at 4 (In *Asay*, "This Court performed a retroactivity analysis under state law using the standard set forth in *Witt v. State*[citation omitted]"); see also *Asay*, 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*.").¹ *Asay* did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Mr. Long's response to the order to show cause in this proceeding. Namely, *Asay* did not address whether a retroactivity "cutoff" drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death

¹ As this Court has repeatedly emphasized, *Witt* addresses retroactivity as a matter of state law, which is separate and distinct from federal retroactivity analysis. See, e.g., *Falcon v. State*, 162 So. 3d 954, 955-56 (Fla. 2015).

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 in light of *Montgomery*.

Hitchcock, in relying totally on *Asay*, also did not explicitly address or reject Mr. Long's 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*"). 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*." But the *Hitchcock* Court's reference to "constitutional provisions" cannot be reasonably read to address Mr. Long's federal retroactivity arguments, as the very next sentence in *Hitchcock* reads: "As such, these arguments were rejected when we decided *Asay*."). *Hitchcock*, 2017 WL 3431500, at *2. As explained, *Asay* rested its analysis entirely on state retroactivity law and the Florida Constitution.

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, many *Hurst* defendants have raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* did not resolve those matters in its exclusively state-law analysis and imploring that federal law be addressed. Those defendants, appellants, and petitioners, as Mr. Long does here, advanced federal retroactivity arguments under the Eighth and Fourteenth Amendments, as well as the Supremacy Clause and *Montgomery*. If this Court had intended to put those arguments to rest in *Hitchcock*, it could have done so. But any fair reading of *Hitchcock* leads to the conclusion that those issues remain unresolved in light of the Court's wholesale reliance on *Asay*. Indeed, *Hitchcock* neither mentions the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, nor the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery* or otherwise explain why the Supremacy Clause does not require the substantive rules announced in the *Hurst* decisions to be retroactively applied by state courts. The State's response to the order to show cause in this case does not contend otherwise.²

The State also suggests that Mr. Long's federal arguments have been addressed in the Eleventh Circuit's decision in *Lambrix v. Sec'y, Fla. Dep't of*

² The State refers to other cases where, like *Hitchcock*, this Court relied on *Asay*'s state-law retroactivity principles to deny relief because the defendants' sentences were final before *Ring*. Because these cases did not address federal retroactivity arguments like those Appellant makes here, they do not preclude relief in this case.

Corr., No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017)[State’s Resp., p. 5-6]. *Lambrix* is not precedential in this Court and was decided in the context of the current federal habeas statute, which dramatically restricts federal review of state-court decisions. This Court’s application of federal constitutional protections, on the other hand, is not circumscribed. More importantly, *Lambrix* dealt with an idiosyncratic issue. Contrary to the State’s assertion that *Lambrix* found that the *Hurst* decisions are not retroactive under federal law, *see* State’s Resp. at 7, *Lambrix* actually dealt with the “retroactivity” of Florida’s *new capital sentencing statute* and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations also render inapplicable to Mr. Long this Court’s recent 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).

Finally, the State relies on *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), for the proposition that even under federal law, the United States Supreme Court’s ruling in *Summerlin*—that *Ring* is not a substantive new rule and thus not retroactive in a federal habeas proceeding—means that *Hurst* is also not retroactive in any proceeding. *See* State’s Resp. at 7-8. However, this argument speciously glosses over the differences between Arizona’s former capital statute and Florida’s

former capital statute, and the effect that *Ring* and *Hurst* had on each one respectively. As Mr. Long explained initially, *see* Appellant's Resp. at 14-15, the Arizona statute at issue in *Ring* and *Summerlin* did not require fact-finding regarding the aggravators *and* their "sufficiency" to justify the death penalty. That difference is critical for federal retroactivity. *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 the *Hurst* decisions where, for the first time, the United States Supreme Court and this Court found it unconstitutional for a judge alone to make a finding of fact as to the "sufficiency" of the aggravation.

III. The State's blurring of *Teague*-based retroactivity cutoffs and this Court's *Ring*-based retroactivity cutoff overlooks the equal protection and due process violations and arbitrary sentencing caused by the *Ring*-based cutoff

The State's argument that retroactivity always includes a cutoff is unpersuasive and exposes the exact equal protection and due process errors and unconstitutionally arbitrary and capricious sentencing that results from any *Ring*-based cutoff. As Mr. Long previously explained, the *Ring* cutoff takes similarly situated death row prisoners on collateral review and arbitrarily divides them depending on when their convictions became final in relation to *Ring*. *See* Appellant's Resp. at 4-7. This differs from *Teague v. Lane*, 489 U.S. 288 (1989), which simply asks whether a defendant's conviction was final at the time the new

rule was announced. *See id.* at 310. Contrary to the State's assertion that the *Ring* cutoff "benefits more defendants" than *Teague* would allow, *see* Appellee's Resp. at 4,6-7, the *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness—and also denial of equal protection and due process—that is not present in typical circumstances where retroactivity is withheld based on widely-recognized pragmatic necessity for courts to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments.

A *Hurst* retroactivity cutoff at *Ring* inaugurates a degree of capriciousness that far exceeds the level justified by "normal" jurisprudence. To see why this is so, one need only consider how Florida's pre-*Ring* inmates do and do not differ from their post-*Ring* peers. The two groups were both sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial. But inmates whose death sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts and 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 also are more likely than their post-*Ring* counterparts to have been sent to death row 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*, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of cases which terminated in a death verdict before *Ring* are cases where a death sentence would not be imposed, or even pursued, in the modern era. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic fact-finding: the past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence—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 a death sentence were unrecognized in the pre-*Ring* era.

Taken together, these considerations s that a *Ring*-based retroactivity cutoff involves a level of caprice that exceeds that tolerated by standard-fare retroactivity rules. A *Ring* cutoff’s denial of relief in precisely the class of cases in which relief Makes the most sense is irremediably perverse and inconsistent with the Eighth and Fourteenth Amendments.

IV. The State’s “harmless error” arguments are inconsistent with the United States Constitution

The State’s “harmless error” arguments rely entirely on the unconstitutional bright-line test, established in *Davis v. State*, 207 So. 3d 142, 176 (Fla. 2016), holding that *Hurst* errors are per se harmless in every unanimous-recommendation

case. *See* State’s Resp. at 13-14. The State ignores Mr. Long’s arguments that this bright-line test is unconstitutional. *See* Appellant’s Resp. at 15-20.

A 12-0 recommendation does not demonstrate that a jury in a constitutional proceeding would have made the three unanimous, beyond-a-reasonable-doubt findings required by *Hurst* and the Sixth and Eighth Amendments (the existence of specific aggravating factors, whether those specific aggravators are together “sufficient” to impose the death penalty, and whether those specific aggravators together outweigh the mitigation). *Hurst v. State*, 202 So. 3d 40, 53-59 (Fla. 2016).

Moreover, as Mr. Long argued in the circuit court and this Court, the uncertainty as to what jurors would have decided in a constitutional proceeding is exacerbated by the jury being instructed that its role was merely advisory. The jury’s understanding of its diminished role resulted in an Eighth Amendment violation in light of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Although this Court held in the past that Florida’s prior scheme did not violate *Caldwell*, those decisions are obviated by *Hurst*. *See Truehill v. Florida*, No. 16-9448, 2017 WL 2463876 (Oct. 16, 2017) (Sotomayor, J., dissenting from denial of certiorari) (“Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme”).

Finally, any reliance on the advisory jury recommendation for harmless-error analysis contravenes the Sixth and Fourteenth Amendments in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), and *In re Winship*, 397 U.S. 358 (1970), because the recommendation does not constitute a constitutionally-valid “verdict” grounded in fact-finding governed by the beyond-a-reasonable-doubt standard.

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively and vacate Mr. Long’s death sentence.

Respectfully submitted,

/s/ Robert A. Norgard
Robert A. Norgard
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863) 533-8556
norgardlaw@verizon.net
Fla. Bar No.: 322059
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Stephen D. Ake at stepehn.ake@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Robert A. Norgard
Robert A. Norgard

EXHIBIT 7

Florida Death Penalty Appeals
Decided in Light of *Hurst*
(Source: Death Penalty Information Center)

DP DEATH PENALTY IC INFORMATION CENTER



Home	Issues	Resources	Facts	Reports	About	Press	Donate
------	--------	-----------	-------	---------	-------	-------	--------

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

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

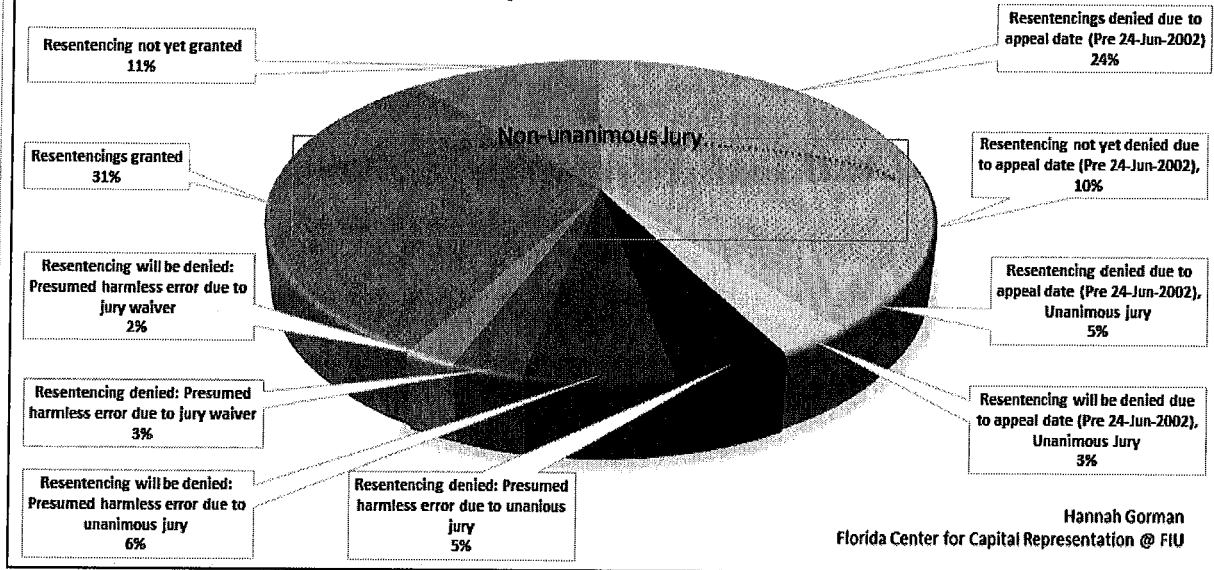


EXHIBIT 8

List of Florida Supreme Court Opinions
Summarily Denying Relief in Light of *Hitchcock*
(Jan.–Feb. 2018)

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)