

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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KENNETH DARCELL QUINCE A/K/A RASIKH ABDUL-HAKIM,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

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**PETITION FOR WRIT OF CERTIORARI**

DEATH PENALTY CASE

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## **CAPITAL CASE**

### **QUESTIONS PRESENTED**

#### **QUESTION ONE**

Whether Florida has violated a capital defendant's long-standing guaranteed right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution, when it made *Hurst v. Florida* only partially retroactive, despite the fact that capital defendants were sentenced illegally?

#### **QUESTION TWO**

Whether the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution applied in concert were violated by Florida when it made *Hurst v. Florida* only partially retroactive?

#### **QUESTION THREE**

Whether Florida's blanket denial of *Hurst v. Florida* review to capital defendants who were advised to waive their right to a bare majority advisory jury pursuant to an illegal sentencing statute violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

## **LIST OF PARTIES**

All parties appear in the caption of the case.

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## **OPINION BELOW**

The opinion of the Supreme Court of Florida was rendered on January 18, 2018, and is reported as *Quince v. State*, 233 So. 3d 1017 (Fla. 2018) and is reprinted in *Appendix A*.

## **JURISDICTION**

The Supreme Court of Florida entered its opinion on January 18, 2018. *Appendix A*. Quince did not file a motion for rehearing.<sup>1</sup> The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **The Fifth Amendment to the Constitution of the United States**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation  
U.S. CONST. amend. V.

### **The Sixth Amendment to the Constitution of the United States**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.  
U.S. CONST. amend. VI.

### **The Eighth Amendment to the Constitution of the United States**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.  
U.S. CONST. amend. VIII.

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<sup>1</sup> Quince timely filed an application for sixty (60) day extension of time to file this petition for writ of certiorari with this Court. This Court granted the application for extension of time to file this petition.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED- CONTINUED**

### **The Fourteenth Amendment to the Constitution of the United States**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

#### **State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

#### **Article I, Section 9 of the Florida Constitution**

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offence, or be compelled in any criminal matter to be a witness against oneself.

FLA. CONST. art. I, § 9.

#### **Article I, Section 22 of the Florida Constitution**

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

FLA. CONST. art. I, § 22.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED- CONTINUED

**Section 921.141, Florida Statutes (1979), entitled “Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. –”**

(2) **ADVISORY SENTENCE BY THE JURY**, - After hearing all the evidence, the jury shall deliberate and ***render an advisory sentence to the court***, based upon the following matters:

- (a) Whether sufficient aggravating circumstances existed as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH**, - Notwithstanding the ***recommendation of a majority of the jury***, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but ***if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based*** as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

FLA. STAT. § 921.141 (1979) (emphasis added); *Appendix E*.

## STATEMENT OF THE CASE

### Trial Court Proceedings

Quince is an almost 60 year old man who is currently incarcerated in the solitary confinement of death row in Florida. On January 17, 1980, Quince was indicted in the Circuit Court of the Seventh Judicial Circuit of the State of Florida in and for Volusia County with first-degree murder, sexual battery (this count was later dismissed by the trial court), and burglary of an occupied dwelling. Trial counsel Howard Pearl<sup>2</sup> was appointed to represent Quince. A mere six months and 25 days after the indictment, Quince pled guilty to first-degree felony murder and burglary on August 11, 1980. Quince waived his right to an advisory jury recommendation (bare-majority to recommend a death sentence). *See* FLA. STAT. § 921.141 (1979)<sup>3</sup>. The colloquy between the trial court and Quince was very brief and non-comprehensive in particular with regard to his penalty phase rights. *See infra* p.6-9.

The history of Quince's mental health evaluations are pertinent for this Court's review. Prior to his plea and waiver, Quince was evaluated by George W. Barnard, M.D. (pursuant to a defense motion), Edward J. Rossario, M.D. (court-appointed) and Frank Carrera, III, M.D. (court appointed). The three doctors were specifically appointed to determine Quince's competency and sanity at the time of the offense. Dr. Barnard opined that "[c]linically [Quince] is judged to be of **dull normal level of intelligence**" and of "borderline-intelligence." Similarly, Dr. Rossario opined that Quince's "intelligence can be described as **slightly below average**." Dr. Ann McMillan was the psychologist who was appointed by the trial court to examine Quince regarding the presence

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<sup>2</sup> At the time that Attorney Pearl represented Quince, "he was also a special deputy sheriff in Marion County and an honorary deputy sheriff in Lake and Volusia Counties, none of which was revealed to" Quince. *Teffeteller v. Dugger*, 676 So. 2d 369, 370 (1996). The conflict of interest for failure of Attorney Pearl to disclose his role to his capital clients was litigated and relief was ultimately denied. *See id.*; *see Quince v. State*, 593 So. 2d 669 (1992); *see Quince v. State*, 732 So. 2d 1059 (1999).

<sup>3</sup> *Appendix E*.

of mental mitigating factors. Dr. McMillan met with Quince on **October 2, 1980**,<sup>4</sup> and administered the Minnesota Multiphasic Personality Test and the Wechsler Adult Intelligence Test to him. Dr. McMillan *opined that Quince suffered from borderline mental retardation, severe specific learning disability*, and neurological impairment. Dr. McMillan further opined that “Quince has *permanent learning and judgment disability and limited ability to perceive the consequences of his actions.*” Dr. McMillan testified that Quince had a “*low intelligence score, which is functioning on an eleven-year-old basis.*” Dr. Stern, a specialist in psychiatry, examined Quince on October 13, 1980. Dr. Stern performed only a mental status examination on Quince to check his mental state to see if he was psychiatrically insane or sane. Like Dr. McMillan, Dr. Stern testified that Quince “*is not a bright gentleman*” and that Quince “*is functioning at a borderline level of intellectual capability.*” There was some evidence prior to the plea and even more evidence after the plea that Quince is an individual of low intelligence who functioned at the age of a minor. It should be noted that after this Court’s decision in *Atkins*,<sup>5</sup> Quince vigorously litigated that he should not be executed because he is mentally retarded/intellectually disabled<sup>6,7</sup>

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<sup>4</sup> Drs. McMillan and Stern did not see Quince prior to his plea of guilt and waiver of jury sentencing. It is clear that trial counsel did not have the knowledge of these expert findings of Quince’s severe deficiencies of intelligence and mental retardation prior to his conversations with his client about the waiver. This fact matters as to the voluntary, knowing and intelligent assessment of Quince’s waiver. *See infra* p.24-33.

<sup>5</sup> *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

<sup>6</sup> In earlier litigation, the terms “mentally retarded” or “mental retardation” were used in place of the terms “intellectually disabled” or “intellectually disability.”

<sup>7</sup> Pursuant to this Court’s decision in *Atkins*, on or about November 1, 2004, Quince filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 as well as Rule 3.203 (which provides for determination of intellectual disability as a bar to execution). The lower court granted an evidentiary hearing on Quince’s successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203 to bar execution due to his mental retardation, and the hearing was conducted on May 12, 2008, May 15, 2008, May 16, 2008, and November 3, 2008. The lower court entered a written final order denying Quince relief and not finding him mentally retarded on November 7, 2011. This order denying Quince’s motion was affirmed on appeal. *See Quince v. State*, 116 So. 3d 1262 (Fla. 2012), *cert. denied*, 134 S. Ct. 2695 (Mem) (2014).

Thereafter, pursuant to this Court’s decision in *Hall v. Florida*, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (holding Florida’s bright-line IQ cut-off score of 70 as unconstitutional), Quince filed a renewed motion for determination of intellectual disability as a bar to execution under Florida Rule of Criminal Procedure

The transcript of the plea colloquy hearing for this Court's review is reprinted in *Appendix E*. It is clear from the colloquy that Quince's waiver was not appropriate or constitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The *brief* questioning of Quince by the trial court was as follows:

THE COURT: All right. Mr. Quince, before I accept your plea, it is necessary that I explain the effect of your plea of guilty here today to you. If you have any questions during my explanation please stop me and ask any questions you have of Mr. Pearl. Now what you are doing today has very serious consequences on your life, and it is important that you understand fully what is going on here today. Do you understand the plea negotiations today?

THE DEFENDANT: Yeah.

THE COURT: You are pleading guilty to Count 1 and Count 3; ***you are waiving the right to have a jury give me an advisory recommendation*** as to what sentence I should impose as to Count 1, life or death, and that matter will be determined by me alone, after having ordered a background investigation, what we call a PSI, and after having a hearing, at which time your counsel will give reasons why there should be life imprisonment, as opposed to the State, which will present evidence at the hearing calling for the death penalty. So you understand that?

THE DEFENDANT: (Nods head).

THE COURT: Now do you understand that the State is going to seek the death penalty in this case?

THE DEFENDANT: Yes.

THE COURT: Okay. Mr. Quince, when you plead guilty in the State of Florida, you are admitting the truth of the charge. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Okay.

THE DEFENDANT: Yes, I do.

THE COURT: Now that's opposed to pleading not guilty. If you please not guilty, before you could be convicted the State would have the burden of proving your guilt beyond and to the exclusion of every reasonable doubt. Do you understand that?

THE DEFENDANT: Yeah, I know.

THE COURT: When you enter a plea of guilty in the State of Florida, one of the things that a plea of guilty does, it severely limits your right to appeal the judgment

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3.203 and § 921.137, Florida Statutes. The lower court found *Hall* to be retroactive to Quince's case and all parties submitted written memoranda of law. On December 28, 2016, the lower court denied Quince relief and did not find him to be intellectually disabled. This order denying Quince relief was also appealed and affirmed by the Florida Supreme Court. *See Quince v. State*, 241 So. 3d 58 (Fla. 2018) (This opinion will be at issue in a separate petition for writ of certiorari before this Court).

and sentence of this Court. If you wanted to appeal my judgment and sentence after you have entered a plea of guilty, you would have a very difficult time doing so. So a plea of guilty narrows your right to appeal. Do you understand that?

THE DEFENDANT: Yeah, I understand.

THE COURT: I'm going to place you under oath and ask you some questions. You must answer my questions fully and truthfully. Mr. Clerk.

(Whereupon the defendant was duly sworn by the clerk.)

THE COURT: How old are you?

THE DEFENDANT: Twenty-one.

THE COURT: And before you in jail, where did you live?

THE DEFENDANT: 321 White Street.

THE COURT: How long have you lived in Daytona Beach?

THE DEFENDANT: All my life.

THE COURT: Where did you go to school?

THE DEFENDANT: Mainland.

THE COURT: How much schooling did you have?

THE DEFENDANT: I stopped in the eleventh grade.

THE COURT: Eleventh grade. Did you go to Mainland High School?

THE DEFENDANT: Yeah.

THE COURT: All right. Do you read, write, speak and understand the English language without difficulty?

THE DEFENDANT: Yeah.

THE COURT: What type of work have you done, what type of jobs or occupation?

THE DEFENDANT: I was a landscaper and a heavy equipment operator.

THE COURT: Do you now or at any time in your past have you suffered from mental or emotional disabilities?<sup>8</sup>

THE DEFENDANT: No.

THE COURT: Are you sober and competent now?

THE DEFENDANT: Yeah.

THE COURT: You are not under the influence of any drug or alcoholic beverage?

THE DEFENDANT: No.

THE COURT: By your plea of guilty you are giving up certain other rights: Your right to remain silent, that is, your right against self-incrimination. Also, you are giving up you very important right to a jury trial as to your guilt or innocence; at

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<sup>8</sup> In the successive proceedings related to Quince's mental retardation/intellectual disability, Thomas Oakland, Ph.D., a licensed psychologist opined that Quince is mentally retarded. Dr. Oakland assessed all three diagnostic prongs as defined by the American Association on Mental Retardation and the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. Robert M. Berland, Ph.D. a forensic psychologist, also opined that Quince was mentally retarded, again after assessing all three diagnostic prongs. The State's expert, Harry McClaren, a psychologist, did not assess all three prongs in opining that Quince was not mentally retarded (Dr. McClaren's opinion that Quince is not mentally retarded is *based solely* on the 2006 IQ testing which an above *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) bright-line cut off result, found unconstitutional by this Court).

that trial the right to be represented by counsel; the right to confront those who testify against you; and the right to compel the attendance of those who testify in your behalf. There will be no further trial of any kind. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: *Although there will be a hearing in aggravation and mitigation at a later date.* Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Also, by your plea you are giving up your right to complain on appeal about any prior ruling the Court has made in your case. Do you understand that?

THE DEFENDANT: Yes.

... [factual basis recited].

THE COURT: Sir, do you admit the truth of the charges by the State of Florida against you?

THE DEFENDANT: Yes.

THE COURT: Has anybody promised you a light sentence or that you would otherwise be rewarded if you plead guilty?

THE DEFENDANT: No.

THE COURT: Do you understand there is no deal as to the sentence in this case?

THE DEFENDANT: Yeah. I understand.

THE COURT: Has anybody threatened you or pressured you to make you plead?

THE DEFENDANT: No.

THE COURT: You are represented by Mr. Pearl, who stands to your side. Have you told him everything you know about your case?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his services as an attorney?

THE DEFENDANT: Yeah, I'm satisfied.

THE COURT: Okay. Mr. Pearl, does the defendant fully understand the effects of the plea negotiations?

MR. PEARL: Your honor, based upon the conferences I have had with Mr. Quince, I have the impression and am convinced to a moral certainty that he understands the nature of the plea and the possible consequences of the plea which he has entered today.

THE COURT: Mr. Quince, there is one other thing I want to clarify with you.

As to Count 1, which is murder in the first degree, you could receive death by electrocution, or you could receive life and sentence without parole until at least twenty-five years have passed.

Additionally, there is potentially another sentence as to Count 3, potentially. And you could receive life imprisonment for that, also; and that could be placed on top of any sentence imposed as to Count 1. They could run consecutively. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

MR. PEARL: Your Honor, it is true, however, is it not, that at the Court's discretion that that sentence upon Count 3 could either be imposed consecutively or concurrently, as the Court may see fit?

THE COURT: That is true. I just wanted to take it at its worst - -

MR. PEARL: Yes, sir.

THE COURT: - - and explain that to him. Do you have any questions about that?

THE DEFENDANT: No.

THE COURT: Do you have any questions about anything we have discussed here this morning?

THE DEFENDANT: No.

THE COURT: All right. Sir, the Court finds you alert and intelligent, you understand the nature of the charges against you, and appreciate the consequences of pleading guilty; the facts which the State if prepared to prove, and which by your plea you admit, are sufficient to sustain the plea. The Court further finds your decision to plead guilty is freely, voluntarily and intelligently made, you have had the advice and counsel of a competent attorney, with whom you say you are satisfied. The plea of guilty is accepted.

*Appendix E* (footnote added).

After a sentencing hearing, the trial court independently imposed a sentence of death on October 21, 1980. The convictions and death sentence were affirmed on direct appeal. *Quince v. State*, 414 So. 2d 185 (Fla. 1982), *cert. denied*, 459 U.S. 895, 103 S. Ct. 192, 74 L. Ed. 2d 155 (1982).

### **Hurst-related State Post-Conviction Proceedings**

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016) striking down Florida's longstanding capital-sentencing procedures<sup>9</sup> because they authorized a judge, rather than a jury, to make factual findings that were the necessary precondition for a death sentence. On remand, the Supreme Court of Florida held, as a state constitutional consequence, that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the sum of aggravation is sufficient to outweigh any

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<sup>9</sup> Florida's capital sentencing procedure which had been in effect (with minor, presently irrelevant changes) since December 8, 1972.

mitigating circumstances and to warrant death. See *Hurst v. State*, 202 So. 3d 40 (2016). The Supreme Court of Florida then addressed the question of the retroactive application of the federal constitutional rule of *Hurst v. Florida* to the State's approximately 380 condemned inmates. *Hurst* (decided on January 12, 2016) had followed *Ring v. Arizona*<sup>10</sup> (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*<sup>11</sup> (decided on June 26, 2000) that all facts necessary for criminal sentencing enhancement must be found by a jury. Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley*<sup>12</sup> that inmates whose death sentences were not yet final on June 24, 2002 (the date of *Ring*, precursor of *Hurst*<sup>13</sup>) were entitled to resentencing under *Hurst v. Florida*. Further, the Supreme Court of Florida held in *Asay*<sup>14</sup> that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing.<sup>15</sup>

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<sup>10</sup> 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

<sup>11</sup> 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

<sup>12</sup> 209 So. 3d 1248 (Fla. 2016).

<sup>13</sup> 136 S. Ct. 616 (2016).

<sup>14</sup> 210 So. 3d 1 (Fla. 2016).

<sup>15</sup> A comparison of the reasoning of the Florida Supreme Court in *Mosley* and *Asay* is puzzling:

(1) In *Mosley*, the court articulates two state-law tests for retroactivity: a "fundamental fairness" test deriving from *James v. State*, 615 F. 2d 668 (Fla. 1993); and a three-factor test deriving from *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The relationship between the two tests is not clear: at one point the *Mosley* opinion appears to treat *Witt* as refining the *James* test (*Witt* "involves a more in-depth consideration of how to analyze when fairness must yield to finality based on changes in the law" [209 So. 3d at 1276]), but at another point it says that "[t]his Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty" (209 So. 3d at 1274-1275). However, the same court's *Asay* opinion makes no reference at all to the *James* test: *James* is not discussed or even cited, and its omission is unexplained.

(2) Florida's *Witt* test closely resembles this Court's pre-*Teague* formula in *Linkletter v. Walker*, 381 U.S. 618 (1965) *disapproved of by Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Stovall v. Denno*, 388 U.S. 2931, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). It considers three factors. In discussing the first factor, "Purpose of the New Rule" (209 So. 3d at 1277), the *Mosley* court concludes that it "weighs heavily in favor of retroactive application" (209 So. 3d at 1278). The *Asay* opinion, discussing the same factor – and describing the "purpose" of *Hurst* no differently than does the *Mosley* opinion – concludes more modestly that this factor "weighs in favor of applying *Hurst v. Florida* retroactively" (210 So. 3d at 10).

(3) The second *Witt* factor is "Reliance on the Old Rule" (*Mosley*, 209 So. 3d at 1278). Analyzing this factor in *Mosley*, the court says it "weighs in favor of granting retroactive relief to the point of the issuance of *Ring*" (209 So. 3d at 1281) "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002" (209 So. 3d at 1280). In *Asay*, the second *Witt* factor "weighs heavily

Also, the Supreme Court of Florida issued an opinion in *Mullens v. State*<sup>16</sup> that created an arbitrary class of defendants that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required in *Ring* and *Hurst*, simply because they waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. The Supreme Court of Florida held that Mullens could not “avail himself of relief” pursuant to *Hurst v. Florida* because he waived an advisory jury recommendation for his penalty phase and elected to be sentenced by the judge. See *Mullens*, 197 So. 3d at 38-40. The Supreme Court of Florida cited *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); and concluded that “nothing prevents a defendant from waiving his *Apprendi* rights . . . . If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.” 197 So. 3d at 38. The Supreme Court of

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against retroactive application of *Hurst v. Florida* to this pre-*Ring* case” (210 So. 3d at 12) because “this Court’s reliance on the old rule has spanned decades’ worth of capital cases, with 386 inmates currently residing on death row and 92 executions carried out since 1976” (*id.*). Notably, (a) the figure “386” includes both the *Mosley* and the *Asay* cohorts; the court invokes as a reliance concern in *Asay* at least 159 cases in which it held retroactive relief appropriate in *Mosley*, plus another 60 cases in which it would deny retroactive relief on harmless-error grounds; and (b) although the *Asay* court mentions in an introductory historical passage that it had rejected a *Ring* claim – the same claim that prevailed in *Hurst v. Florida* – in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), it does not discuss *Bottoson* in its reliance analysis and thus does not explain why Florida prosecutors and courts were less entitled to rely on the constitutionality of Florida’s unchanged statutory sentencing scheme after *Ring* (and *Bottoson*) than before.

(4) The third *Witt* factor is “Effect on the Administration of Justice” (*Mosley*, 209 So. 3d at 1281). In its analysis of this factor, the *Mosley* court says that “[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual” (209 So. 3d at 1281): “[H]olding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief” (209 So. 3d at 1282). The *Asay* court, in contrast, concludes that the “Effect” factor “weighs heavily against applying *Hurst v. Florida* retroactively to *Asay*” (210 So. 3d at 13). It says nothing about the considerations that “convictions will not be disturbed” and that “not every defendant . . . will ultimately receive relief” since some defendants waived jury trial and others will be unable to establish that *Hurst* error was prejudicial (see *Mosley*, (209 So. 3d at 1282)).

<sup>16</sup> 197 So. 3d 16 (Fla. 2016), *cert. denied sub nom. Mullens v. Florida*, 137 S. Ct. 672 (2017)

Florida fails to acknowledge that any waiver can never be appropriate because the right purportedly waived was pursuant to an illegal sentencing statute. FLA. STAT. § 921.141 (1979). Further, it is clear from the colloquy that Quince's waiver was not appropriate or constitutional in light of *Apprendi*.

After the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State*<sup>17</sup> were rendered, Quince timely filed a successive motion to vacate his sentence of death pursuant to Florida Rule of Criminal Procedure 3.851 on January 9, 2017. After a case management conference, the postconviction court summarily denied Quince relief. A written order denying relief was later issued. *Appendix C*. Quince appealed the denial of his successive motion to vacate his sentence of death to the Supreme Court of Florida. The Supreme Court of Florida issued an Order specifically directing all parties to file briefs to specifically address why the Court should not affirm the lower court's order in light of *Mullens*<sup>18</sup>. *Appendix B*.

On January 18, 2018, the Supreme Court of Florida denied Quince relief. *See Quince v. State*, 233 So. 3d 1017 (Fla. 2018); *Appendix A*. The Supreme Court of Florida in affirming the postconviction court's denial held as follows:

In *Mullens*, we held that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." 197 So. 3d at 40. We have since consistently relied on *Mullens* to deny *Hurst* relief to defendants who waived a penalty phase jury. *E.g.*, *Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017); *Knight v. State*, 211 So. 3d 1, 5 n.2 (Fla. 2016); *Robertson v. State*, No. SC16-1297, 2016 WL 7043020, at \*1 n.1 (Fla. Dec. 1, 2016) (unpublished); *Davis v. State*, 207 So. 3d 177, 212 (Fla. 2016), cert. denied, --- U.S. ---, 137 S. Ct. 2218, 198 L. Ed. 2d 663 (2017); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016). Quince made a valid waiver of his right to a penalty phase jury, and his arguments here do not compel a departure from our precedent. Accordingly, because Quince waived his right to a penalty phase jury, he is not entitled to *Hurst* relief.

Moreover, because Quince's sentence became final nearly twenty years

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<sup>17</sup> 209 So. 3d 1248 (Fla. 2016).

<sup>18</sup> 197 So. 3d 16 (Fla. 2016).

before *Ring* was decided, his *Hurst* claim is also foreclosed by our decision in *Asay*. See *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla.), *cert. denied*, --- U.S. --, 138 S. Ct. 513, 199 L. Ed. 2d 396 (2017); *Asay*, 210 So. 3d at 22; see also *Lambrix v. State*, 227 So. 3d 112, 113 (Fla.) (rejecting argument that the Eighth Amendment, equal protection, and due process require that *Hurst* be applied retroactively to defendant whose sentences were final prior to *Ring*), *cert. denied*, --- U.S. ---, 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017). We therefore affirm the trial court's order denying Quince's successive motion for postconviction relief.

*Id.* at 1018 (internal citations re-formatted). This ruling is before this Court for review.

## REASONS FOR GRANTING THE WRIT

### QUESTION ONE

WHETHER FLORIDA HAS VIOLATED A CAPITAL DEFENDANT'S LONG-STANDING GUARANTEED RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT MADE *HURST V. FLORIDA* ONLY PARTIALLY RETROACTIVE, DESPITE THE FACT THAT CAPITAL DEFENDANTS WERE SENTENCED ILLEGALLY?

The questions before this Court begin with the simple premise that FLA. STAT. § 921.141 (1979), Florida's death sentencing statute, was unconstitutional when it was enacted, and now Florida wants to reap the benefit of its unconstitutional law to execute pre-*Ring* condemned individuals. Quince was deprived of this inalienable guaranteed right when he was subjected to Florida's unconstitutional judge sentencing scheme pursuant to FLA. STAT. § 921.141 (1979). In Florida, the maximum punishment for first-degree murder on the basis of a conviction alone is life imprisonment. This Court held that the *Sixth Amendment requires* a jury to make the findings necessary to differentiate first-degree murder from first-degree murder for which a defendant may be sentenced to death. *Hurst*, 136 S. Ct. at 621 (citing *Apprendi*, 530 U.S. at 494 and *Ring v. Arizona*, 536 U.S. 584, 597, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)). The Sixth Amendment to the Constitution was proposed on September 25, 1789 and ratified on December 15, 1791. *See* U.S. CONST. amend. VI. In accordance with the mandate of the Constitution, every capital inmate must be granted this specific right. Florida's decision to restrict *Hurst*<sup>19</sup> review to June 24, 2002, when *Ring* was decided, can never be constitutional because it was Florida that deprived its capital defendants of this unwavering constitutional guarantee. In order not to violate this guaranteed Sixth Amendment right, which has existed since 1791, *Hurst*<sup>20</sup> must be applicable to all capital defendants who were sentenced under Florida's unconstitutional sentencing scheme that belittles

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<sup>19</sup> 136 S. Ct. 616 (2016).

<sup>20</sup> 136 S. Ct. 616 (2016).

a jury's role. *See* U.S. CONST. amend. VI; *see* FLA. CONST. art. I, § 22; *see* FLA. STAT. § 921.141 (1979).

In *Apprendi*, Justice Scalia wrote a powerful concurrence on the unwavering and vital guarantee of our Constitution to the explicit right to a jury trial. *See id.* at 498-99. Those words bear repeating:

I feel the need to say a few words in response to Justice BREYER's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

As for fairness, which Justice BREYER believes "[i]n modern times," *post*, at 2397, the jury cannot provide: I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years-and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.

In Justice BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (Justice BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee-what it has been assumed to guarantee throughout our history-the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

Justice BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what

it says. And the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,” has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury. *Apprendi*, 530 U.S. at 498-99 (2000) (emphasis in original) (Scalia, J. concurring); *see also Blakely v. Washington*, 542 U.S. 296, 301-302, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)<sup>21</sup>. In the same opinion, Justice Thomas echoed Justice Scalia’s words in a detailed concurrence that looked at the history of the right to a jury trial as guaranteed in the Constitution. *See id.* at 499-523 (Thomas & Scalia, JJ. concurring). Justice Thomas wrote in part the following:

This case turns on the seemingly simple question of what constitutes a “crime.” Under the Federal Constitution, “the accused” has the right (1) “to be informed of the nature and cause of the accusation” (that is, the basis on which he is accused of a crime), (2) to be “held to answer for a capital, or otherwise infamous crime” only on an indictment or presentment of a grand jury, and (3) *to be tried by “an impartial jury of the State and district wherein the crime shall have been committed.”* Amdts. 5 and 6. *See also* Art. III, § 2, cl. 3 (“The Trial of all Crimes ... shall be by Jury”). With the exception of the Grand Jury Clause, *see Hurtado v. California*, 110 U.S. 516, 538, 4 S. Ct. 111, 28 L. Ed. 232 (1884), the Court has held that these protections apply in state prosecutions, *Herring v. New York*, 422 U.S. 853, 857, and n. 7, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). ***Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

*Apprendi*, 530 U.S. at 499-500 (emphasis added) (Thomas & Scalia, JJ. concurring). This Court unequivocally held that the Sixth Amendment right to a jury trial taken with the Fourteenth

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<sup>21</sup> Justice Scalia reminded that the right to a jury trial has been longstanding as follows:

Other than the fact of a prior conviction, any 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.” ***This rule reflects two longstanding tenets of common-law criminal jurisprudence:*** that the “truth of every accusation” against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,” 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that “an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872). ***These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing;*** we compiled the relevant authorities in *Apprendi*, *see* 530 U.S., at 476-483, 489-490, n. 15; *id.*, at 501-518, 120 S. Ct. 2348 (THOMAS, J., concurring), and need not repeat them here.

(emphasis added)(internal footnotes omitted).

Amendment right to due process guarantees a criminal defendant “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* at 476-478 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)). This Court looked to its opinion in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and other cases from the early 1970s, to reinforce the long-standing due process protection every criminally accused individual is guaranteed which includes the right to a jury sentencing. *See id.* at 476-485; *see also Blakely*, 542 U.S. 308 (“Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*’s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges’ intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.” (Scalia, J. writing for majority)). In recognition of *Apprendi*, this Court held in *Hurst* that Florida’s sentencing scheme was unconstitutional for the simple reason that the “Sixth Amendment *requires* a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation if not enough.” *Hurst*, 136 S. Ct. at 619 (emphasis added).

Florida violated the sacred words of its own constitution and the Constitution of the United States when it passed a sentencing statute that hindered the constitutional ultimate sentencing role of a jury to that of a mere opinion. *See* U.S. CONST. amend. VI; *see* FLA. CONST. art. I, § 22; *see* FLA. STAT. § 921.141 (1979). Defendants in Florida have challenged this sentencing statute from its inception to no avail, until this Court’s decision in *Hurst v. Florida*. Defendants in Florida challenged this sentencing scheme in light of this Court’s decision in *Apprendi* and *Ring*. In the interim, many death-sentenced individuals have been executed by Florida under this

unconstitutional scheme. Many more, like Quince, will continue to be executed because his case was not final before June 24, 2002. A date cannot be the final say as to who lives or dies; a sentencing jury must be. Partial retroactivity can never ensure fairness and uniformity in individual adjudications and would amount to arbitrary application of the death penalty. *See Asay v. State*, 210 So. 3d 1, 37-41 (Fla. 2016) (Perry, J. dissenting “The grave injustice of assigning whether a person lives or dies on a date in time, when it is clear that they were illegally sentenced is irreversible.”). Therefore, this Court must make *Hurst* applicable to all capital defendants who were sentenced under Florida’s unconstitutional sentencing scheme to ensure the foregoing guaranteed protections. Florida cannot gain the benefit for violating the Sixth and Fourteenth Amendment rights of capital defendants like Quince by executing them pursuant to an unconstitutional sentencing law.

The importance of a unanimous jury for a death sentence to be constitutional is evident from *Hurst v. Florida* and *Hurst v. State*. *Hurst v. State* held that the “specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.” Such findings are manifestly substantive.<sup>22</sup> *See Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016)

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<sup>22</sup>In contrast, in *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989) - the basis of *Hurst v. Florida* - was not retroactive on federal collateral review. The rationale of *Summerlin* was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama* - a case where the certiorari petition had not made a *Hurst* or *Ring* argument - the Supreme Court granted a *Hurst*-based petition for rehearing, vacated the state court’s judgment, and remanded to the state court for further consideration in light of *Hurst*. *See* 136 S. Ct. 1837 (Mem) (2016). The Supreme Court then followed this approach in three additional cases. *See Wimbley v. Alabama*, 136 S. Ct. 2387 (Mem) (2016); *Kirksey v.*

(holding that the decision whether a particular juvenile is or is not a person “whose crimes reflect the transient immaturity of youth” is substantive, not procedural). Because the Sixth Amendment rules announced in *Hurst v. State* are substantive, Quince is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

Partial retroactivity would render these illegal death sentences cruel and unusual punishment and a grave injustice. There are a number of condemned men and women whose cases have facts similar or more egregious than in Quince’s case, but they will be afforded the right to *Hurst* review simply because they have the fortune of having cases that became final after *Ring*. See, e.g., *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (Convicted of kidnapping, robbery, and first degree murder of 81 year old Janet Patrick, who was abducted from a Publix. Jury recommendation was 9-3); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (Convicted of the kidnapping, sexual battery, and stabbing and beating of Deborah Tressler, who was found dead in a wooded area. Jury recommendation was 8-4); *Hodges v. State*, 213 So. 3d 863 (Fla. 2017) (Convicted of the first-degree murder by bludgeoning with a hammer and stabbing with a knife of the victim in her home. There was also evidence that the defendant was engaged in a sexual battery or attempted sexual battery when he killed the victim. There was *Williams v. State*, 110 So. 2d 654 (Fla.1959) rule evidence of a collateral murder introduced. Jury recommendation was 10-2); *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997) (Convicted of the first-degree murder, burglary of a dwelling, sexual battery with physical force, kidnapping and robbery of 80 year old Dorothy

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*Alabama*, 136 S. Ct. 2409 (Mem) (2016); *Russell v. Alabama*, 137 S. Ct. 158 (2016).

Last month, in *Powell v. Delaware*, the Delaware Supreme Court held that its recent decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), which invalidated Delaware’s death penalty scheme under *Hurst*, applied retroactively under that state’s retroactivity doctrine. See 153 A. 3d 69 (Del. 2016). As the *Powell* Court noted, *Schriro* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof.” *Id.* at 73.

Berger. Jury recommendation was 11-1); *Durousseau v. State*, 218 So. 3d 405 (Fla. 2017) (Convicted of the first-degree murder by strangulation of a young female victim, whose body was found nude from the waist down by her sister and stepfather. At the time, Durousseau had been indicted on five counts of first-degree murder for the deaths of five women where he used the same methodology as in this case. Jury recommendation was 10-2); *Ault v. State*, 213 So. 3d 670 (Fla. 2017) (Convicted of two counts first-degree murder, two counts of sexual battery on a child under twelve years old, two counts of kidnapping a child under thirteen years old and two counts of aggravated child abuse. The victims were sisters aged eleven and seven. Jury recommendation was 9-3 on each victim); *Deviney v. State*, 213 So. 3d 794 (Fla. 2017) (Convicted of the first-degree murder of a petite elderly 65 year old woman with multiple sclerosis who was cut from ear-to-ear and was found nude from the waist down. Jury recommendation was 8-4); *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (Convicted of first-degree murder, sexual battery with a deadly weapon, second degree arson and grand theft motor vehicle. The victim was a mother who was stabbed and found dead in a van that was set on fire after her death. Jury recommendation was 11-1); *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (Convicted of the First degree murder, attempted first degree murder, robbery with a firearm, and fleeing to elude a law enforcement officer operating a marked vehicle. The victims of the murder and attempted murder were residents of a retirement community. Jury recommendation was 11-1); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (Convicted of two counts of murder; strangulation death of victim Lynda Wilkes and the death of infant Jay-Quan by placing him crying into a tied garbage bag. Jury recommendation was 8-4); *Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (Convicted of the first-degree premeditated murder, first-degree murder, and shooting into a building arising from the death of an 8 year old child. Jury recommendation was 8-4); *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (Convicted of first-

degree murder of Sergeant Ruben Thomas who was a corrections officer at a prison facility where Franklin was serving life sentences for prior convictions of first-degree murder and armed robbery with a firearm. Jury recommendation was 9-3); *Abdool v. State*, 220 So. 3d 1106 (Fla. 2017) (Convicted of the first-degree murder by burning the victim alive. Jury recommendation was 10-2); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (Convicted of first-degree murder of Deputy John Greeny and the attempted murder of Deputy Robert Sallustio and armed robbery. Jury recommendation was 9-3); *Robards v. State*, 214 So. 3d 568 (Fla. 2017) (Convicted of the first-degree murders of an elderly couple, Frank and Linda Deluca. Jury recommendation was 7-5.); *Zommer v. State*, 160 So. 3d 368 (Fla. 2010) (Convicted of the first-degree murder of a 77 year old woman. Jury recommendation was 10-2); *Johnson v. State*, 205 So. 3d 1235 (Fla. 2016) (Convicted of three counts of first-degree murder. Jury recommendation was 11-1 for each victim); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (Convicted of the first degree murder for the shooting death of his wife, who fled his moving vehicle. Jury recommendation was 10-2); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (Convicted of two counts of first-degree murder, one count of first-degree premeditated murder, one count of attempted first-degree felony murder, three counts of armed kidnapping and two counts of armed robbery. These facts stemmed from the armed robbery of the employees of a Waffle House. Jury recommendation was 9-3). The foregoing limited list of cases clearly demonstrates that partial retroactivity cannot be constitutional when all the defendants were subjected to the same illegal sentencing statute. Despite the truly heinous facts of some of the foregoing listed murders, the condemned defendants will receive the opportunity for a new re-sentencing proceeding if the State continues to seek the death penalty. Quince will not receive the same opportunity to be re-sentenced because of an arbitrary date.

The grave injustice of assigning whether a person lives or dies on a date in time, when it is

clear that they were illegally sentenced, is irreversible. *See Asay*, 210 So. 3d at 37-41 (“[U]nder the present majority’s decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after *Ring*, cannot receive the death penalty without the protections articulated in *Hurst*. . . The majority’s application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated.” (Perry, J. dissenting) (internal footnote omitted)). As a matter of due process and equal protection of laws under the Fourteenth Amendment of the United States Constitution that all death sentences under Florida’s unconstitutional sentencing scheme must be entitled to retroactive application of *Hurst*. *See* U.S. Const. amend. XIV. It can never be repeated enough that “Death is Different” and is permanent.

## **QUESTION TWO**

WHETHER THE EIGHTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION APPLIED IN CONCERT WERE VIOLATED BY FLORIDA WHEN IT MADE *HURST V. FLORIDA* ONLY PARTIALLY RETROACTIVE?

In light of fundamental fairness, due process, equal protection, and the evolving standards of decency, partial retroactivity that sets a point in time as to whether a person lives or dies can never be constitutional. Quince submits to this Court that in accordance with his Sixth, Eighth, and Fourteenth Amendment rights, he should receive retroactive application of *Hurst*. This Court’s opinions in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), hold true that “if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty” (*id.* at 428). Succinctly put, this principle “insist[s] upon general rules that ensure consistency in determining who receives a death sentence.” *Kennedy v. Louisiana*, 554 U.S. 407, 436, 128 S. Ct. 2641, 171 L.

Ed. 2d 525 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); see U.S. CONST. amend. VIII. The Supreme Court of Florida's post-*Hurst* retroactivity rulings inaugurate a degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

As a matter of due process and equal protection of laws under the Fourteenth Amendment of the United States Constitution, all death sentences under Florida's unconstitutional sentencing scheme must be entitled to retroactive application of *Hurst*. See U.S. CONST. amend. XIV, § 1. It can never be repeated enough that "Death is Different" and is permanent. Quince must be granted retroactive relief of *Hurst v. Florida*. The result of Florida's dividing line pursuant to *Asay* creates a chasm between similarly situated condemned capital defendants. The condemned men and women of Florida who have all been sentenced pursuant to the same unconstitutional statute, FLA. STAT. § 921.141, are being treated differently and are being afforded dissimilar rights and remedies, all because of an arbitrary date. See *Asay*, 210 So. 3d 1; see *supra* p.19-21 (limited list of Florida cases where post-*Ring* cases got *Hurst* review and relief). Florida's actions strikes at the heart of the Eighth Amendment's equal protection and due process guarantees. See *Quince*, 233 So. 3d at 1018 (citing *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017)). Society's evolving standards of decency demand that Quince be granted *Hurst* relief, as the jury vote in Florida has evolved from a bare majority advisory jury, to a ten-to-two advisory jury, to now a unanimous sentencing jury. See ch. 2016-13, Fla. Laws (2016), available at <http://laws.flrules.org/2016/13><sup>23</sup>.

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<sup>23</sup> On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies.

### QUESTION THREE

WHETHER FLORIDA'S BLANKET DENIAL OF *HURST V. FLORIDA* REVIEW TO CAPITAL DEFENDANTS WHO WERE ADVISED TO WAIVE THEIR RIGHT TO A BARE MAJORITY ADVISORY JURY PURSUANT TO AN ILLEGAL SENTENCING STATUTE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Quince and other similarly-situated capital defendants should not forfeit their lives merely because they waived fictional right pursuant to an unconstitutional statute. The Supreme Court of Florida's opinion in *Mullens* to deny Quince *Hurst* review cannot stand constitutional muster. See *Quince*, 233 So. 3d at 1018. The Supreme Court of Florida has created a blanket bar to capital defendants for waiving an unconstitutional bare majority advisory jury from *Hurst* review. Quince could not constitutionally waive a right that was wrongfully not afforded to him. Moreover, even if he could, the waiver could never be knowing, voluntary and intelligent. Furthermore, Quince's waiver colloquy was not thorough, nor did it demonstrate that Quince unequivocally waived his penalty phase proceedings.

Whether Quince waived his Sixth Amendment right as defined in *Ring*, and now *Hurst*, is a federal question that is controlled by federal law. See *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional abandonment of a known right. See *id.* at 4 (citations omitted). Any waiver of Sixth Amendment rights must be knowing and voluntary. See *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); see *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst*, 304 U.S. at 464. This Court stated that "courts indulge every reasonable presumption against

waiver of fundamental constitutional rights” and that this Court does not “presume acquiescence in the loss of fundamental rights.” *Id.* (footnoted omitted). “It is settled law that an inferred waiver of a constitutional right is disfavored.” *Brewer v. Williams*, 430 U.S. 387, 412, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (Powell, J., concurring).

A defendant cannot waive a right that was not yet recognized by the courts. *See Halbert v. Michigan*, 545 U.S. 605, 623, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *see Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (“the waiver must have been made with *full awareness* of both the *nature of the right being abandoned and the consequences of the decision to abandon it.*” (emphasis added); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, 2010 WL 5572832, at \*6 (S.D. Fla. Dec. 8, 2010) (“It is axiomatic that a party cannot waive a right that it does not yet have.”); *see Cruz v. Lowe’s Home Centers, Inc.*, 2009 WL 2180489, at \*3 (M.D. Fla. Jul. 21, 2009); *cf. Menna v. New York*, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) (guilty pleas do not “inevitably waive all antecedent constitutional violations” and a defendant can still raise claims that “stand in the way of conviction [even] if factual guilt is validly established”). At the time of Quince’s sentencing, Florida’s unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a sentence of death. Therefore, Quince could never waive his right to a jury fact-finding and a requirement of a unanimous jury sentencing. *See Halbert*, 545 U.S. at 623; *see Hurst v. Florida*, 136 S. Ct. 616; *see Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 (“the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.”) *See also Hurst v. State*, 202 So. 3d at 62, n. 18. Quince could not constitutionally waive a right that was wrongfully not afforded to him. Furthermore, Quince’s colloquy discussed

below is clear evidence that demonstrates that he could never waive a right when he is deprived of it by Florida law.

The Supreme Court's decision in *Mullens* and *Quince* has created an arbitrary class of defendants that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required in *Ring* and *Hurst*, simply because the defendant waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. The Supreme Court of Florida's quoted *Blakely*, to conclude the following:

nothing prevents a defendant from waiving his *Apprendi* rights . . . . If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

*See Mullens* 197 So. 3d at 38 (quoting *Blakely*, 542 U.S. at 310). The Supreme Court of Florida's reliance on *Blakely* is misplaced. The foregoing quoted statement by Justice Scalia, in *Blakely*, was in rebuttal to Justice Breyer's argument "that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge." *Blakely*, 542 U.S. at 310. This case was reversed and remanded because *Blakely* was deprived of his constitutional Sixth Amendment right to have a jury determine all the facts necessary beyond a reasonable doubt to determine his sentence enhancement. *See id.* at 301. This was not a case where *Blakely* waived his right to a jury sentencing pursuant to an unconstitutional law. *See id.* Indeed, upon remand, *Blakely* could waive his right to a jury sentencing at his re-sentencing, but he would be waiving a right pursuant to a sentencing procedure ***that was corrected by this Court***. This Court did not create case law that permitted blanket waivers of unconstitutional sentencing procedures to withstand future challenges. *Quince* and capital defendants must be afforded the same correction as *Blakely*, *Apprendi*, *Ring*, and *Hurst*, by this Court before a sentence

of death can be ultimately imposed.

Certainly, no waiver can ever be appropriate or valid in these cases. *See Brewer v. Williams*, 430 U.S. at 404 (“courts indulge in every reasonable presumption against waiver.”); *see also Johnson v. Zerbst*, 304 U.S. at 464 (The State must prove “an intentional relinquishment or abandonment of a **known right or privilege**.”). Especially, when the right being waived provided less protection than it does now, i.e. a minor-majority jury recommendation versus a unanimous jury factfinding and ultimate decision-making. However, should this Court determine that a defendant could waive his jury sentencing, even though the right did not exist, then this Court must inquire into the waiver colloquy in light of *Apprendi* and the Constitution of the United States. *See Mullens*, 197 So. 3d at 39; *see Whitmore v. Arkansas*, 495 U.S. 149, 165, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990); *see Godinez v. Moran*, 509 U.S. 389, 401, n.12, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); *see also Rodgers v. Jones*, 3:15-cv-507-RH, ECF No.15 (N.D. Fla. Aug. 24, 2016). The Sixth Amendment to the United States Constitution provides that a defendant has a fundamental right to a jury trial. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). However, fundamental constitutional rights can be waived when a defendant so chooses. *See Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Nonetheless, an effective waiver of a constitutional right must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Further, the constitutionality or appropriateness of a waiver of a constitutional right, such as Quince’s Sixth, Fifth, and Fourteenth Amendment rights, must be unequivocal. U.S. CONST. amends. V; VI; XIV. This Court in *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) demonstrated the detailed inquiry that is necessary to determine whether a criminal defendant has unequivocally waived his right to counsel. Specifically, this Court held as follows:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused **must ‘knowingly and intelligently’ forgo those relinquished benefits.** *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S. Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S. Ct. 316, 323, 92 L. Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, **he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’** *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S. Ct. at 242.

Here, weeks before trial, Faretta **clearly and unequivocally** declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the ‘ground rules’ of trial procedure. *Faretta*, 422 U.S. at 835-36 (emphasis added) (internal footnote omitted). It should be noted just how detailed the colloquy was by the Court in *Faretta* to make sure that the defendant was aware of not only his rights but the court also articulated the dangers of waiving his right. *See Pasha v. State*, 39 So. 3d 1259, 1261 (Fla. 2010) (quoting *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008) (“It is clear that ‘[b]efore the trial court can make a decision whether to permit the defendant to proceed pro se, the defendant’s request for self-representation must be unequivocal.’”).

The importance of an appropriate and detailed colloquy cannot be understated when assessing whether a waiver of a constitutional right is valid. Quince’s colloquy cannot be seen as an unequivocal waiver of his jury sentencing rights because he is not advised to any of the pros or cons of his decisions. *Appendix E*; *see supra* p.6-9. He is simply told that he is waiving the right to a jury recommendation to the Court. *See id.* When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of those rights, having been informed as to all of the dangers and disadvantages of waiving that right. *See id.* There was no

such inquiry in Quince's colloquy that would satisfy denying him *Hurst* review.

It is clear from the colloquy that Quince's waiver was not appropriate or constitutional in light of *Apprendi*. The primary focus of the trial court was the waiver of rights associated with the guilt/innocence phase and the rights that accompany a jury trial. The trial court made a passing reference [emphasized in the block quote] at the beginning of the colloquy as to the waiver of a jury recommendation to the court and later, that there will be a hearing in aggravation and mitigation. There was no questioning specifically aimed at the penalty phase proceedings or the bare majority recommendation. This colloquy cannot be considered appropriate or unequivocal; therefore the State cannot offer judge factfindings. *See Mullens*, 197 So. 3d at 38.<sup>24</sup> Moreover, Quince's colloquy immensely pales in comparison to Mullens' colloquy that consisted of "persistent questions" and a "thorough colloquy." *Mullens*, 197 So. 3d at 39 (Mullens remarked to the trial court that "it seem[s] like [the court] keep[s] asking the same thing like [he] is making the wrong decision or something." Mullens said he was "absolutely positive" as to his waiver). There were no questions by the trial court regarding the specific rights that are abandoned by the waiver of jury sentencing at a penalty phase that were detailed in *Mullens* by this Court in support of its denial. *See id.* Further, there were no questions by the trial court regarding Quince's intellectual

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<sup>24</sup> What should not be forgotten by this Court is that experts have determined that Quince has deficient intellectual functioning, a fact that certainly calls into question his understanding of the plea colloquy and the consequences of waiving a *jury recommendation*. *See Atkins*, 536 U.S. 304. ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." (internal footnotes omitted)). Of note, Freddie Lee Hall (found to be intellectually disabled) and Tavares Wright (argued that he was intellectually disabled and two experts diagnosed him as such), both of low intelligence like Quince, also waived their jury sentencings. *See Hall v. State*, 201 So. 3d 628 (Fla. 2016); *see Wright v. State*, 213 So. 3d 881 (Fla. 2016) *cert. granted, judgment vacated sub nom. Wright v. Florida*, 138 S. Ct. 360 (Mem) (2017).

capabilities despite evidence of his cognitive deficits. *See id.* (“The trial court was fully cognizant of Mullens’ status and his background.”); *see supra* p.4-5.<sup>25</sup> At the bench trial there was obvious and relevant evidence as to Quince’s mental deficiencies, which shows that the colloquy was deficient. Prior to the plea colloquy, trial counsel was not aware of the grave deficits in Quince’s intellectual capacity. *See supra* p.4-5; 30, n.25. The trial court even found the mental mitigator that Quince had the inability to appreciate the criminality of his conduct, but only gave it little weight because of conflicting evidence. *See Quince*, 414 So. 2d at 186. It is clear that Quince’s intellectual functioning was and still is severely deficient. *See supra* p.4-5.

Notwithstanding the insufficient colloquy, Quince cannot waive a constitutional right that should have been afforded to him and every capital defendant, if the constitutional right did not exist at the time. The fact that Quince’s trial counsel stated that he believed that Quince understood the possible consequences of his plea is not relevant as he advised him under the belief of an unconstitutional sentencing law. *See Hurst*, 136 S. Ct. 616; *see Ring*, 536 U.S. 884. Now that a unanimous jury is needed to sentence a defendant to death, the conversations and assessments between counsel and criminal defendants dramatically changes. Moreover, the colloquy by a court in cases of waivers will also dramatically change. *Hurst* will impact an attorney’s strategy and decision-making throughout the trial, including the decision of whether or not to waive a penalty phase jury. No longer will the jury’s role in determining death-eligibility be advisory; the jury will

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<sup>25</sup> Dr. Barnard confirmed his finding that “[c]linically [Quince] is judged to be of dull normal level of intelligence.” Dr. Barnard also testified that based on defense expert Dr. Ann McMillan’s data, “he would say [Quince] is borderline level intelligence.” Dr. Rossario clearly wrote that Quince’s “intelligence can be described as slightly below average.” Dr. McMillan opined that Quince suffered from borderline mental retardation, severe specific learning disability and neurological impairment. Dr. McMillan further opined that “Quince has permanent learning and judgment disability and limited ability to perceive the consequences of his actions.” Dr. McMillan testified that Quince had a “low intelligence score, which is functioning on an eleven-year-old basis.” Dr. Stern testified that Quince “is not a bright gentleman” and that Quince “is functioning at a borderline level of intellectual capability.”

make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis, the landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

Quince never had the constitutional benefit of the option of a penalty phase jury to return a verdict making findings of fact. So we have no way of knowing what aggravators, if any, a jury unanimously could have found beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they carried the immense responsibility for whether a death sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all considerations for a conversation regarding a waiver and/or a colloquy. Reviewing courts cannot speculate as to what the findings or vote would be in a case where Quince would be allowed a jury sentencing where twelve jurors have to make a binding decision. Consideration must be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join in a death recommendation at resentencing.

When this Court compares Mullens' colloquy to Quince's, there is no comparison. The lower court erred in its findings and must be reversed. Quince did not have an appropriate and unequivocal waiver of his jury sentencing. Quince was predominantly questioned about the

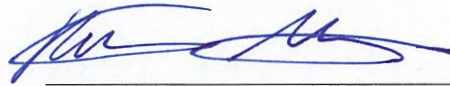
waiver of his guilt/innocence phase and the effect of a plea of guilt. Moreover, Quince's case represents why it is dangerous for this Court to create a blanket denial of *Hurst* review for waiver of jury sentencing cases. This Court must look at each case. Now, under *Hurst*, Quince would get a life sentence if one juror voted for life versus the unconstitutional bare majority recommendation. Quince's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, and *Hurst v. Florida*. The *Hurst* error in Quince's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Quince's death sentence must be vacated and a resentencing ordered.

This case conflicts with this Court's decisions in *Ring*, *Apprendi*, and *Hurst* because Quince was denied his Sixth Amendment right to jury fact- finding on all elements necessary in order to impose the death penalty. This case also conflicts with *Halbert v. Michigan*, which held that such a waiver is impossible when the right is not recognized by the state at the time of the waiver. This issue impacts all capital defendants in Florida who waived an unconstitutional advisory jury determination.

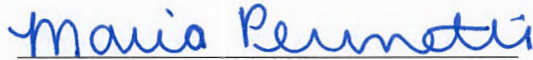
## CONCLUSION

For all the foregoing reasons, this Court should grant the petition for writ of certiorari and order further briefing in Mr. Quince's case.

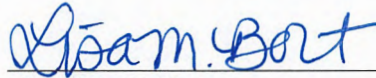
Respectfully submitted



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Dated