

No. _____

IN THE
Supreme Court of the United States

TONEY DERON DAVIS,

Petitioner,

v.

JULIE L. JONES, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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Supreme Court of Florida

No. SC17-1711

TONEY DERON DAVIS,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 30, 2018]

PER CURIAM.

Toney Deron Davis petitions this Court for a writ of habeas corpus seeking relief pursuant to the United States Supreme Court’s decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court has jurisdiction. See art. V, § 3(b)(9), Fla. Const.

After this Court decided Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), we ordered Davis to show cause why Hitchcock should not be dispositive in this case.

After reviewing Davis's response to the order to show cause, as well as the State's arguments in reply, we conclude that Davis is not entitled to relief. Davis was sentenced to death following a jury's recommendation for death by a vote of eleven to one. Davis v. State, 703 So. 2d 1055, 1057 (Fla. 1997). Davis's sentence of death became final in 1998. Davis v. Florida, 524 U.S. 930 (1998). Thus, Hurst does not apply retroactively to Davis's sentence. See Hitchcock, 226 So. 3d at 217. Accordingly, we deny Davis's petition.

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

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

PARIENTE, J., concurring in result.

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

Original Proceeding – Habeas Corpus, Duval County,
Case No. 161992CF013193AXXMA

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for Respondent

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-1711

Lower Tribunal No(s):
161992CF013193AXXXMA

TONEY DERON DAVIS

vs. JULIE L. JONES, ETC.

Petitioner(s)

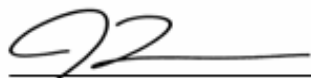
Respondent(s)

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

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

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



jat

Served:

JOE HAMRICK
JENNIFER L. KEEGAN
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CASE NO.: SC17-1711
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RICK A SICHTA

FLORIDA SUPREME COURT
500 South Duval Street
Tallahassee, Florida 32399

CASE NO.: SC17-1711
L.T. NO.: 16-1992-CF-13193

TONEY DERON DAVIS

v.

STATE OF FLORIDA

Petitioner.

Respondent.

**PETITIONER’S RESPONSE TO THIS COURT’S
SEPTEMBER 27, 2017 HITCHCOCK SHOW CAUSE ORDER**

INTRODUCTION

At 10:13 p.m. on Friday, September 22, 2017, Petitioner filed a petition for writ of habeas corpus. By Wednesday, September 27, 2017, this Court had already issued a show cause order in Petitioner’s case, ordering Petitioner to explain why, in twenty pages or less, that his “habeas corpus should not be denied in light of this Court’s decision Hitchcock v. State, SC17-445.”

Hitchcock answered none of the relevant arguments presented in Mr. Davis’ habeas petition, as a brief overview of the *Hitchcock* and *Asay* decisions makes evident. As this Court has never ruled upon Mr. Davis’ substantive arguments, it would be a violation of his constitutional rights for this Court to limit his appellate rights by denying his petition upon a decision of no precedential value for the arguments that Davis has presented.

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HITCHCOCK/ASAY

In *Hitchcock*, the majority wrote: “Although Hitchcock references various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay. *Hitchcock*, 2017 WL 3431500, at *2. But, as Justice Pariente pointed out in her dissent, “[t]his Court did not in Asay, however, discuss the new right announced by this Court in Hurst to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, Asay does not foreclose relief in this case, as the majority opinion assumes without explanation.” *Id.*, at *4 (Pariente, J., dissenting). In *Asay v. State*, 210 So. 3d 1, 14 (Fla. 2016), this Court acknowledged that the U.S. Supreme Court in *Hurst v. Florida* did not address “whether Florida’s sentencing scheme violated the Eighth Amendment.” The entirety of the Court’s analysis in Asay hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016) should apply retroactively to *Asay*. *See id.* at 15. *Hurst v. Florida* is a Sixth Amendment case. The Sixth Amendment rights addressed in *Hurst v. Florida* have nothing to do with the substantive Eighth Amendment rights addressed in *Hurst v. State*.

The *Asay* majority acknowledged that “*Hurst v. Florida* derives from *Ring* [*v. Arizona*, 536 U.S. 584 (2002)],” 210 So. 3d at 15, and ultimately concluded that

Hurst v. Florida should not apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) to people whose convictions were final before *Ring*. But as this Court also recognized in *Asay*, *Hurst v. Florida* did not address the question of whether Florida’s scheme violated the Eighth Amendment. *Id.* at 14 (emphasis added). Thus, although this Court decided in *Asay* that *Hurst v. Florida* should not apply to pre-*Ring* individuals, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*. In *Hitchcock*, the Court declined to analyze the other “various constitutional provisions” cited by *Hitchcock*, and those issues were not decided in *Hitchcock*. 2017 WL 3431500, at *2.

Therefore, *Hitchcock* has no precedential value and does not foreclose relief. It is axiomatic that “[t]o be of value as a precedent, the questions raised by the pleadings and adjudicated in the case cited as a precedent must be in point with those presented in the case at bar.” *Twyman v. Roell*, 166 So. 215, 217 (Fla. 1936). In other words, “no decision is authority on any question not raised and considered, although it may be involved in the facts of the case.” *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930). Florida courts have held that where an “issue was not presented to the court, and . . . was not decided by the court,” then the decision issued by that court is not binding on lower courts on that issue. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007); *see also Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1218 (Fla. 3d DCA 2003) (rejecting

argument that two cases were binding precedent and must be followed because “neither of these cases decided the point now before us”). Because *Asay* is silent on the issue of whether Florida’s scheme violates the Eighth Amendment under *Hurst v. State*, and *Hitchcock* merely cites to *Asay*, stare decisis does not apply and *Hitchcock* is not binding precedent on issues not raised or decided in *Asay*. Furthermore, this Court has recognized that stare decisis is not immutable, and may yield if there has been an error in legal analysis. See *Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla. 2012).

Hitchcock, for which a petition for certiorari is pending before the U.S. Supreme Court, is both unsound in principle and unworkable in practice. *Hitchcock* is unsound in principle because it cites to *Asay* for the proposition that neither *Hurst* decision should apply to *Hitchcock* retroactively, when *Asay* only addressed the Sixth Amendment implications of *Hurst v. Florida*. And it is unworkable in practice because each appeal raises unique issues, and due process requires a full consideration of those issues in each individual appeal. This Court has created an unworkable practice by attempting to dispose of dozens of cases under *Hitchcock* without further analysis.

Mr. Davis’ habeas petition challenges this Court’s retroactivity decision on several bases. First, Mr. Davis argues that under federal retroactivity analysis, as applied to the states through *Montgomery v. Louisiana*, *Hurst v. Florida* and

Hurst v. State establish new substantive constitutional rights. Second, Mr. Davis argues that the current position of this Court, that retroactivity only reaches back to cases that became final at least one day after *Ring*, violates the following constitutional rights of Mr. Davis: (a) the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, and (b) the Fourteenth Amendment's guarantee of equal protection and due process. The arguments asserted in appealing to these "various constitutional provisions" are fundamental and deserve a full briefing and hearing before this Court, as well as written analysis as to their merit, which they have not yet received from this Court in any case.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

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

Mr. Davis is exercising a substantive right to petition this Court for habeas relief. *See* Fla. R. App. P. 9.100(a); Art. 1, Sec. 13, Fla. Const. His habeas petition presents issues which concern the continued viability and constitutionality of Mr.

Davis' death sentence. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. Because he has been provided this substantive right, Mr. Davis's right to litigate his habeas petition is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). The process by which the Court has directed Mr. Davis to proceed in his appeal, indicates its intention on binding Mr. Davis to the outcome rendered in Hitchcock's appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another.

The fact that this Court has *sua sponte* issued identical orders, in numerous other cases, employing the same truncated procedure it does here, reflects a prejudgment of the appeals and their scope. Mr. Davis deserves an individualized appellate process, particularly because *Hitchcock* did not raise the same issues at stake here.

“The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Yet, Mr. Davis is being denied that opportunity by this Court’s attempt to confine him to the outcome in *Hitchcock* without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution. Moreover, in denying relief in *Hitchcock*, this Court relied upon *Asay v. State* for the determination that *Hurst* was not retroactive to cases final before *Ring v. Arizona*. *Hitchcock v. State*, Case No. SC17-445 at *2-3. This Court did so despite the fact that the opinion in *Asay* was not premised upon, nor did it even address, the holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

It is in that regard that this Court must acknowledge that the holding in *Asay*, and this Court’s reliance upon that holding in *Hitchcock*, does not foreclose the availability of *Hurst* relief to Mr. Davis. *Hurst v. Florida* was a momentous shift in United States Supreme Court’s jurisprudence in the manner which it recognized that Florida’s capital sentencing scheme violated the Sixth Amendment where it

did not require the jury to make the requisite findings of fact necessary to impose a sentence of death. However, its most important role was to serve as the catalyst for this Court's decision in *Hurst v. State*.

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

In this case, the initial habeas petition thoroughly addressed this Court's question in its show cause order, including why the *Hurst* decisions are substantive new rules that apply retroactively under federal law and how the current *Ring*-based cutoff violates the federal guarantee of equal protection and due process. The petition also explained that this Court's failure to address federal retroactivity in this or any other case precluded this Court from relying on its recent, state-law-based *Hurst* jurisprudence to deny Petitioner's claims, which were based in federal retroactivity law. Petitioner submits a condensed version of those argument below, but requests that this Court address the arguments from his habeas petition in full.

RELEVANT PROCEDURAL HISTORY

The penalty phase of Davis' case was conducted pursuant to the former version of F.S. 921.141, which the U.S. Supreme Court in *Hurst v. Florida* in January of 2016 held to be unconstitutional. The single aggravating factor that was submitted to the jury was that the crime was committed in the course of a sexual battery or an attempt to commit sexual battery. *Davis I*, 703 So. 2d at 1060. The jury was instructed that its verdict was merely advisory to the trial court. *Davis II*, 136 So. 3d at 1201. The jury deliberated for only thirty-four minutes and returned a recommendation of death by an 11-1 vote. (32 R 1143.)

The trial judge set a sentencing hearing for June 28, 1995, and told each side they could present sentencing memoranda prior to the hearing. (32 R 1147, 1148.) The judge instructed each side that they would be able to “present any matters that you think are relevant to sentencing.” (32 R 1148.) The State filed its sentencing memorandum on June 27, 1995 – the day before the hearing – ***and for the first time referenced a second aggravating circumstance – heinous, atrocious and cruel (“HAC”).*** (3 R 404-408.) The State then argued HAC to the judge at the hearing, **and the judge considered and found HAC and the contemporaneous sexual battery to be proven by the State beyond a reasonable doubt.** Davis I, 703 So. 2d at 1060. The trial court determined that both aggravators had been proven, weighed them against the mitigation offered by Davis, and sentenced him

to death. Id. at 1060.

Davis raised eight claims on direct appeal. Id. at 1057-58. Davis argued in Claim V of the appeal that the trial court erred in finding HAC, when that aggravator had not been submitted to the jury. Davis asserted, “Here, the record establishes that the court neither instructed the jury that it could consider HAC and the State neither presented nor argued that particular aggravating circumstance but moreover, the court’s instructions specifically took consideration of HAC from the purview of the jury by its specific instruction that the only aggravating circumstance it could consider was death during the course of sexual battery.” (Direct Appeal IB 27 (emphasis added).)

This Court denied relief on all claims on November 6, 1997. *Davis I*, 703 So. 2d at 1062. As to Claim V, this Court rejected the claim as not being sufficiently preserved at the trial level and denied it on the merits as well, relying on pre-Ring caselaw. Id. at 1060-61 (citing “*Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985) (court’s finding of HAC was not error even though jury was not instructed on it); *Fitzpatrick v. State*, 437 So. 2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it.); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983) . . .”).

Davis timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on May 3, 1999. (14 PCR 2558.) He filed an

amended 3.851 motion on May 6, 2004 and a “Third Motion, as Amended” on July 27, 2006. Within these motions, Davis alleged 14 claims with numerous sub-claims, including claim twelve that “Davis was denied a reliable sentencing when the jury’s role was diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), and claim thirteen that “Davis was denied a reliable sentencing when the jury’s role was diminished in violation of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).” *Davis II*, 136 So. 3d at 1183.

ARGUMENT

I. Petitioner’s death sentence violates *Hurst*, and the error is not “harmless”

Petitioner was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida’s scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were “sufficient” to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida’s unconstitutional scheme, an “advisory” jury rendered a generalized recommendation for life or death by a

majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

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

Davis's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentenced Davis to death. The record does not reveal whether Davis's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed

the mitigation. But the record *is* clear that Davis’s jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Davis’s pre-*Hurst* jury recommended the death penalty by a vote of 11-1. This Court’s precedent makes clear that *Hurst* errors are not harmless where the defendant’s pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) (“[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.”). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury’s recommendation was not unanimous.¹

To the extent any of the aggravators applied to Davis were based on prior convictions, the judge’s finding of such aggravators does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does not authorize death sentences based on the mere existence of an aggravator. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the “sufficiency” of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why this Court has consistently rejected the idea that a judge’s finding of prior-conviction

¹ See, e.g., *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote).

aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst*”).²

Further, Davis’ jury was instructed that its recommendation would only be advisory, so it did not feel the full burden of its decision in recommending death for Davis, which *Hurst* found to be a critical flaw in Florida’s death penalty scheme. Thus, the jury instructions in this case also violated the Eighth Amendment, as set forth in *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (“This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its ‘truly awesome responsibility.’” In this case, the State sought to minimize the jury’s sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort

² Moreover, although this Court’s state-law precedent is sufficient to resolve any harmless-error inquiry in this case, the United States Constitution would also prohibit a denial of relief based on the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided—based solely on the pre-*Hurst* jury’s advisory recommendation—would violate the Sixth and Eighth Amendments. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury’s belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

As recognized by the three dissenting votes on the U.S. Supreme Court to Monday’s denial of certiorari in the cases of *Truehill* and *Oliver*:

At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors’ sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. “This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task,” and we have thus found unconstitutional under the Eighth Amendment comments that “minimize the jury’s sense of responsibility for determining the appropriateness of death.” *Caldwell v. Mississippi*, 472 U. S. 320, 341 (1985).

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, where “the court [was] the final decision-maker and the sentencer—not the jury.” *Combs v. State*, 525 So.2d 853, 857 (1988). In *Hurst v. Florida*, 577 U. S. ___, ___(2016) (slip op., at 10), however, we held that process, “which required the judge alone to find the existence of an aggravating circumstance,” to be unconstitutional.

With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

Truehill v. Florida, 16-9448; *Oliver v. Florida*, 17-5083 (Justice Sotomayor, with

whom Justice Ginsburg and Justice Breyer join, dissenting from the denial of certiorari).

II. 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.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis.

Montgomery, 136 S. Ct. at 728-29 (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.”) (emphasis added). Thus, *Montgomery* held, “[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, 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)). 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.* *Miller* “bar[red] life without parole For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.” *Id.* at 734.

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

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Petitioner under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

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

The United States Supreme Court's decision in *Welch* is illustrative of the substantive nature of *Hurst*. In *Welch*, the Court addressed the retroactivity of the

constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*’s ruling was substantive because it “affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied”—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural “does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive,” but rather whether “the new rule itself has a procedural function or a substantive function,” i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, “[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence.” *Id.* Thus, “*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause.” *Id.* “It follows,” the Court held, “that *Johnson* is a substantive decision.” *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a

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

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. In *Ring*, the Arizona statute permitted a death sentence to be imposed on a finding of fact that at least one aggravating factor existed. *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 the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself “[made] a certain fact

essential to the death penalty . . . [the change] would be substantive.” 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that “sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware’s state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”).³

³ The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec’y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Petitioner’s arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: “A state court’s decision rises to the level of an unreasonable application of federal law only where the ruling is

C. This Court has an obligation to address Petitioner’s federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Petitioner’s federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a “valid excuse”); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 340-42 (1816).

Addressing those claims meaningfully in the present context requires full briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court ignored them. Dismissing this appeal on the basis of *Hitchcock* would compound that error.

III. This Court’s “retroactivity cutoff” at *Ring* is unconstitutional and should not be applied to Davis

objectively unreasonable, not merely wrong; even clear error will not suffice.” *Id.* at *8 (internal quotation marks omitted). In contrast, this Court’s application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (“[W]e hold that the Supreme Court’s decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury’s recommended sentence must be unanimous”). Second, *Lambrix* dealt with an idiosyncratic issue—the “retroactivity” of Florida’s new capital sentencing statute. *Lambrix* did not argue, as Petitioner does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

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.

The *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Davis the same *Hurst* relief being granted in scores of materially indistinguishable collateral-review cases. Denying Davis *Hurst* retroactivity because his death sentence became final in 1998, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

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

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

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

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

extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

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

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court’s date-of-*Ring*-based retroactivity approach include whether a resentencing was granted. Under the Court’s current approach, “older” cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other

less “old” cases are not. *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *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 Davis, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Davis would not.

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

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

Making *Hurst* retroactive to only post-*Ring* sentences also unfairly denies *Hurst* access to defendants who were sentenced between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*. The fundamental unfairness of that result is stark given that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. See *Ring*, 536 U.S. at 588-89. And in *Hurst v. Florida*, the Court repeatedly stated that Florida’s scheme was incompatible with “*Apprendi*’s rule,” of which *Ring* was an application. 136 S. Ct. at 621. This Court itself has acknowledged that *Ring* was an application of *Apprendi*. See *Mosley*, 209 So. 3d at 1279-80. This Court’s drawing of its retroactivity cutoff at *Ring* instead of *Apprendi* represents the sort of capriciousness that is inconsistent with the Eighth Amendment.

B. This Court’s retroactivity cutoff violates the Eighth Amendment’s guarantee of reliability in capital sentencing

Hurst v. State was premised upon this Court’s interpretation of what the Florida Constitution and the national consensus required under the Eighth Amendment to ensure reliability of death sentences. In *Hurst v. State* this Court held that it is reliability that is the touchstone of the Eighth Amendment in capital cases. And it is the need for reliability that led to this Court’s decision in *Hurst v. State*, requiring unanimity under the Eighth Amendment and the Florida Constitution. That decision by necessity inherently implied this Court acknowledged the constitutional requirement for reliability in a death sentence and

recognized the need for enhancing reliability in Florida under its capital sentencing statute. This Court's opinion in its simplest terms is the acknowledgement that cases in which unanimity was not required are inherently less reliable and carry with that lack of reliability the impermissible likelihood that the decision to impose death was made arbitrarily and wantonly in violation of the Eighth Amendment. *See Furman v. Georgia*; 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976). Thus, it is within that context that the proper basis for Mr. Davis's argument against this Court's approach to limited retroactive application of *Hurst* in both *Asay* and *Hitchcock* is properly understood. This Court's continued reliance on *Asay* to repeatedly reject *Hurst* claims similar to Mr. Davis's will amount to the denial of due process and a fair opportunity to challenge his sentences of death.

Mr. Davis challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict on all findings of fact lacks reliability. This is a much different and stronger argument in support of retroactivity under *Hurst v. State* than the one made by Mr. Hitchcock. The Eighth Amendment requires that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*.

In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, this Court's decisions in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice, such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*. Mr. Hitchcock did not make this argument as to the retroactive benefit of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment, nor has this Court addressed this issue.

While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death as discussed in *Hall*, there are individuals with pre-*Ring* death sentences that are founded upon proceedings layered in error to the

extent that the cumulative unreliability overcomes any interests the State may have in finality.

Additionally, it is important to also note that while the State's interest in finality increases the older the case is, older cases will often have greater unreliability due to advances in science and improvements in the quality of representation in capital cases over time. This is especially accurate in Mr. Davis's case where he has raised claims in postconviction challenging the reliability of the forensic evidence at trial and the ineffective assistance counsel at both guilt and penalty phase. On appeal from denial of those claims by the circuit court, this Court determined that Mr. Davis was incapable of establishing prejudice at penalty phase given the "substantial aggravation" in the case and the "brutal and disturbing nature" of the murders. *Davis v. State*, 940 So. 2d 1109, 1137-38 (Fla. 2006). That finding was premised upon this Court's understanding that a jury's advisory recommendation would not be altered in favor of life unless six jurors would have been convinced to vote in favor of life--a standard which, of course, has since been rejected by this Court in *Bevel v. State*, __ So. 3d __, 2017 WL 2590702 (Fla. June 15, 2017).

As such, death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The

older the death sentence, the more likely it is as to the unreliability of the death sentence due to the less reliable scientific methodology the further back in time the death sentence was imposed.

Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001 (“A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.”). When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Davis’s death sentence compounds the unreliability of his death recommendation. A recommendation that was returned by a jury unaware of its sentencing responsibility, as recognized in *Hurst v. State*, to such an extent that the interests of fairness outweigh the State’s interest in finality in his case.

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

This Court’s retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without “some ground of difference that rationally explains the different treatment.” *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are

created to receive different treatment by a state actor like this Court, the question is whether there is a rational basis for the different treatment. *Id.*; *see also* *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury and those who will not, the state’s justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, this Court’s *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest. *See Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying *Hurst* retroactivity to “pre-*Ring*” defendants like Petitioner violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state-created right to direct appeal); *Hicks*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O’Connor, J., concurring) (liberty interest in

meaningful state competency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *Evitts*, 469 U.S. at 393. 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. Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See, e.g., Ohio Adult Parole Auth.*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31. In *Hicks*, the Supreme Court held that the trial court’s failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 447 U.S. at 343.

CONCLUSION

This Court should find that *Hitchcock* is not binding on any of the issues raised by Davis in his habeas petition, hold full briefing on these arguments, and ultimately conclude that federal law requires the *Hurst* decisions to be applied retroactively to Davis, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer Keegan at jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com.

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IN THE SUPREME COURT OF FLORIDA

TONEY DERON DAVIS,

Petitioner,

v.

CASE NO. SC17-1711
CAPITAL CASE

STATE OF FLORIDA,

Respondent.

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

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<u>Rodriguez v. State</u> , 219 So. 3d 751 (Fla. 2017)	9
<u>Schriro v. Summerlin</u> , 542 U.S. 348 (2004)	11, 13
<u>Smith v. State</u> , 598 So. 2d 1063 (Fla. 1992)	6
<u>Stein v. Jones</u> , No. SC16-621, 2017 WL 836806 (Fla. Mar. 3, 2017)	9
<u>Suggs v. Jones</u> , No. SC16-1066, 2017 WL 1033680 (Fla. Mar. 17, 2017)	9
<u>Teague v. Lane</u> , 489 U.S. 288 (1989)	4, 10
<u>Trease v. State</u> , 41 So. 3d 119 (Fla. 2010)	3
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STATEMENT OF THE CASE AND FACTS

Toney Deron Davis was convicted of first-degree murder, aggravated child abuse, and sexual battery for the murder of a two-year-old child, Caleasha Cunningham. Davis v. State, 703 So. 2d 1055 (Fla. 1997). In the penalty phase, the jury recommended a death sentence by a vote of eleven to one. The trial court found the following aggravating factors (“aggravators”): (1) the murder was committed during the course of a sexual battery; and (2) the murder was especially heinous, atrocious, or cruel (HAC). Id. at 1057. The trial court did not find any statutory mitigating circumstances (“mitigators”) and found one nonstatutory mitigator focusing on positive aspects of Davis’ family background. Id. The Florida Supreme Court affirmed petitioner’s conviction and death sentence on direct appeal on November 6, 1997. Id. (rehearing denied January 9, 1998). His conviction and sentence became final when the United States Supreme Court declined to grant certiorari review in his case on June 15, 1998. Davis v. Florida, 524 U.S. 930 (1998).

In 2016, Davis appealed to this Court the trial court’s denial of a successive postconviction motion. When this Court affirmed the lower court’s order, this Court addressed whether Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), applied retroactively to Davis’ case. On February 17, 2017, this Court denied retroactive application of Hurst to Davis’ case pursuant to Asay v.

State (Asay V), 210 So. 3d 1 (Fla. 2016). Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017).

On January 12, 2017, Davis filed another Successive Postconviction Motion (“Successive Motion”) in the trial court seeking Hurst relief. On February 17, 2017, the trial court denied the Successive Motion, holding that Asay V, 210 So. 3d at 1, Mosley v. State, 209 So. 3d 1248 (Fla. 2016), and Gaskin v. State, 218 So. 3d 399 (Fla. 2017), barred retroactive application of Hurst to Davis’s case, and as such, the Successive Motion was untimely under Rule 3.851(d), Florida Rules of Criminal Procedure. In lieu of appealing the lower court’s order, on September 22, 2017, Davis filed a Petition for Writ Habeas Corpus (“Habeas Petition”) in this Court seeking relief under Hurst v. Florida and Hurst v. State.

On August 10, 2017, this Court affirmed the lower court’s denial of Hurst relief in Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), in accordance with this Court’s prior decision in Asay V. On September 27, 2017, this Court issued an order for Davis to show cause as to “why the habeas corpus should not be denied in light of this Court’s decision in Hitchcock v. State, SC17-445.” On October 17, 2017, Davis filed his “Petitioner’s Response to This Court’s September 27, 2017 Hitchcock Show Cause Order” (“Response”). Davis also filed a Motion to Accept Enlarged Brief. The following day, Respondents submitted a written objection and asked this Court to toll time for Respondent to file its reply

until the Motion to Accept Enlarged Brief was disposed of. On October 25, 2017, this Court issued its Order granting Davis' Motion to Accept Enlarged Brief and granting Respondents' request to toll time to file its reply. This is Respondents' Reply to Davis's Response.

SUMMARY OF THE ARGUMENT

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

ARGUMENT

Davis argues that various constitutional rules mandate the retroactive application of Hurst v. Florida and Hurst v. State to his case. Davis is not entitled to relief based on this Court's precedent, and he has failed to show cause as to why his Habeas Petition should not be denied.

In Asay v. State (Asay V), 210 So. 3d 1, 22 (Fla. 2016), this Court held that Hurst v. State, 202 So. 3d 40 (Fla. 2016), is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring v. Arizona, 536 U.S. 584 (2002). 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,¹” which enumerates the federal retroactivity standards. Asay V, 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).²

A. Davis’ Hurst Claim is Barred by the Doctrine of Res Judicata

Davis presents multiple arguments for why Hurst should be applied retroactively to his case. However, the doctrine of res judicata bars any Hurst relief in Davis’ case because this Court has previously rejected his claim that Hurst applies retroactively to his case. Florida law establishes that

[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.”

Fla. Dept. of Transportation v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (quoting Kimbrell v. Paige, 448 So. 2d 1009, 1012 (Fla. 1984)). “Based on principles of res

¹ Teague v. Lane, 489 U.S. 288 (1989).

² Davis appears to complain about being bound by the limited briefing order in this case and the holdings in Asay and Hitchcock on due process grounds. This Court’s long-standing tag procedure does not violate due process. Indeed, the United States Supreme Court has long employed a somewhat similar procedure. See, e.g., Lawrence v. Chater, 516 U.S. 163, 166 (1996) (“the [grant, vacate, remand] order has, over the past 50 years, become an integral part of this Court’s practice, accepted and employed by all sitting and recent Justices”).

judicata, a judgment on the merits will thus bar ‘a subsequent action between the same parties on the same cause of action.’” Id. (quoting Youngblood v. Taylor, 89 So. 2d 503, 505 (Fla. 1956) (emphasis omitted)).

This Court has already issued a ruling denying Hurst relief in Davis’ case.³ In 2016, Davis appealed to this Court a trial court denial of a successive postconviction motion. When this Court affirmed the lower court’s order, this Court addressed whether Hurst v. Florida and Hurst v. State applied retroactively to Davis’ case, and held that it did not. Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017) (relying on Asay V, 210 So. 3d at 1). As this Court has already issued a final order denying retroactive application of Hurst to Davis’ case, res judicata bars reconsideration of this claim here.

B. The June 24, 2002, Cutoff for Hurst Retroactivity is Not Unconstitutional

Davis alleges that the retroactivity cutoff for Hurst relief established by Asay V, 210 So. 3d at 1, violates various constitutional principles, including the Due Process Clause, the Equal Protection Clause, fundamental fairness, and the Eighth Amendment protection against unreliable and arbitrary and capricious punishment. To support his point, Davis notes various facts in other cases, such as how long this Court took to issue its opinion in a case. (Response at 25-27). He asserts that the

³ This Court’s ruling in Davis’ prior appeal is now final as the time for filing a petition for writ of certiorari in the United States Supreme Court has expired.

differing circumstances of a case will affect when the case was final and thereby affect whether a given defendant is entitled to a review of Hurst error in his case. Davis appears to conclude that it is unconstitutional to extend Hurst relief to some defendants and not others based on when their convictions and sentences became final.

While every case is different, and these differences may impact when a conviction and sentence become final, these differing outcomes arise in every circumstance where a new constitutional rule is not applied retroactively to cases on collateral review. If Davis's complaints were valid, they would compel retroactive application to every case every time a change in the law occurred. Such a result would upend any semblance of finality in the criminal justice system.

Finality is a significant consideration when determining whether to apply new rules to existing cases. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)). In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See also Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending

direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst benefits more appellants instead of less.

Davis argues that failing to apply Hurst retroactively to his case violates the Eighth Amendment's guarantee of reliable sentencing because his jury did not vote unanimously for death. In a similar vein, he also argues that the June 24, 2002, Hurst retroactivity cutoff violates the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment's prohibition of arbitrary and capricious punishments. (Response at 24-34) He argues these alleged constitutional errors entitled him to retroactive application of Hurst. These claims are clearly meritless.

Recently, Cary Lambrix raised similar claims in his 2017 appeal in this Court. Initial Brief of Appellant, Lambrix v. State, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017). In its Lambrix opinion, this Court made clear that its opinions in Hitchcock, 2017 WL 3431500 at *1, and Asay v. State (Asay VI), 224 So. 3d 695 (Fla. 2017), contemplated and rejected such constitutional arguments.⁴ Lambrix, at *1-2. Moreover, the process under which Davis was sentenced was reliable⁵. The

⁴ Davis's argument that it is unfair to extend Hurst retroactivity to the Ring decision date but not to the June 26, 2000, decision date of Apprendi v. New Jersey, 530 U.S. 466 (2000), is meritless. Unlike Ring, the Apprendi opinion clearly states it does not apply to capital cases, and thus the decision date should not serve as an end for Hurst retroactivity. Apprendi, 530 U.S. at 496-97. Further, this Court has declined to extend Hurst relief in Lukehart v. Jones, No. SC16-1255, 2017 WL 1033691, *1 (Fla. Mar. 17, 2017), in which the conviction and sentence became final after Apprendi, but before June 24, 2002.

⁵ To the extent Davis argues the role of his jury was diminished in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory, this claim is

jury in his case was instructed that a majority vote was required for a death recommendation, and they returned a verdict of eleven to one. Davis' jury was never instructed in a way that would jeopardize the reliability of its verdict. Davis, 703 So. 2d at 1055. Davis' death sentence is not unreliable, and neither the Due Process Clause, the Equal Protection Clause, nor the Eighth Amendment entitle him to retroactive application of Hurst.

Further, Davis asserts briefly that this Court must extend Hurst retroactively to his case under the fundamental fairness doctrine. (Response at 27, fn. 4). Davis misinterprets the Mosley v. State, 209 So. 3d 1248 (Fla. 2016), holding to extend Hurst relief to pre-Ring cases through the fundamental fairness doctrine when an Apprendi or Ring claim was previously raised. The Mosley fundamental fairness discussion concerned the impact this Court's reliance on pre-Hurst precedent had on Mosley's post-Ring case. Specifically, the Court noted that Mosley had previously sought Ring relief and was denied on bases this Court now considers incorrect. Mosley, 209 So. 3d at 1275. Mosley's fundamental fairness discussion was never intended to create an exception to the June 24, 2002, Hurst retroactivity cutoff, and this Court has confirmed this by rejecting the same argument in Gaskin v. State, 218

meritless. This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to Caldwell. Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017).

So. 3d 399 (Fla. 2017). Fundamental fairness does not compel retroactive application of Hurst to Davis' case.

This Court has consistently adhered to using June 24, 2002 as the cutoff point for retroactivity.⁶ This Court's Hitchcock opinion reaffirmed the decision in Asay V and rejected Hitchcock's various constitutional arguments. This Court noted that Hitchcock's constitutional arguments against the Ring retroactivity cutoff had already been considered and rejected in the Asay V opinion. Hitchcock, 2017 WL 3431500 at *2; see also Asay VI, 224 So. 3d at 703 (rejecting the claim that Chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix, 2017 WL 4320637 at *1 (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

⁶ See Asay, 210 So. 3d at 8, 22; Jones v. State, No. SC15-1549, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017); Hitchcock, 2017 WL 3431500; Zack v. State, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017); Zakrzewski v. Jones, 221 So. 3d 1159 (Fla. 2017); Oats v. Jones, 220 So. 3d 1127 (Fla. 2017); Marshall v. Jones, No. SC16-779, 2017 WL 1739246 (Fla. May 4, 2017); Rodriguez v. State, 219 So. 3d 751 (Fla. 2017); Willacy v. Jones, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); Suggs v. Jones, No. SC16-1066, 2017 WL 1033680, *1 (Fla. Mar. 17, 2017); Lukehart, No. SC16-1225, 2017 WL 1033691, *1; Cherry v. Jones, No. SC16-694, 2017 WL 1033693, *1 (Fla. Mar. 17, 2017); Archer v. Jones, No. SC16-2111, 2017 WL 1034409, *1 (Fla. Mar. 17, 2017); Jones v. Jones, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017); Geralds v. Jones, No. SC16-659, 2017 WL 944236, *1 (Fla. Mar. 10, 2017); Lambrix v. State, 217 So. 3d 977 (Fla. 2017); Stein v. Jones, No. SC16-621, 2017 WL 836806 (Fla. Mar. 3, 2017); Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017); Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017); Bogle v. State, 213 So. 3d 833 (Fla. 2017); Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Fla. Jan. 30, 2017); Gaskin, 218 So. 3d at 399.

In sum, the June 24, 2002 Hurst retroactivity cutoff date is not unconstitutional. Davis’ various constitutional arguments are unpersuasive and have been previously rejected by this Court in other cases.

C. Hurst Does Not Establish a New Substantive Constitutional Rule

Davis alleges that Hurst is retroactive under the United States Supreme Court’s retroactivity test put forth in Teague v. Lane, 489 U.S. 288 (1989), because Hurst constitutes a substantive change. (Response at 18). Davis relies upon Ivan V. v. City of New York, 407 U.S. 203, 205 (1972), and Powell v. Delaware, 153 A. 3d 69 (Del. 2016), to support his argument. (Response at 22). He claims that Hurst is a substantive change because it “addressed the proof-beyond-a-reasonable-doubt standard.” (Response at 22). However, the standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991). Davis’s reliance on Powell is misplaced because the Delaware Supreme Court in Powell agreed that Ring and Hurst did not change the burden of proof that was used in those cases. Powell, 153 A. 3d at 74 (“neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof”). Powell, 153 A. 3d at 74. Furthermore, Powell addressed the retroactivity of Rauf v. State, 145 A. 3d 430 (Del. 2016), the Delaware Court’s initial case interpreting Hurst v. Florida. The Delaware

Court distinguished Rauf from Hurst and Ring because Rauf addressed burden-of-proof issues that existed under Delaware state law. Rauf, at 74. Because the Delaware Court held Rauf retroactive based on issues specific to Delaware state law, the Powell case is easily distinguishable from Hurst and fails to support Davis's claim.

Importantly, the United States Supreme Court addressed the retroactivity of Ring, and found that it was a procedural rule that did not justify retroactive application. In Schriro v. Summerlin, 542 U.S. 348 (2004), the Supreme Court determined that Ring was not a substantive constitutional change in the law because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id., at 353. Ring did not alter the type of conduct that is punishable nor the group or class of people that can be punished under the law. Id. Thus, the new rule established by Ring was procedural in nature and not retroactive to convictions and sentences that were already final. Id. at 358. Since the Supreme Court held that Ring did not create a substantive constitutional rule, and Hurst is simply an extension of Ring to Florida's sentencing scheme, Hurst is likewise procedural in nature and is not retroactive to convictions and sentences that are already final.

Davis further relies on Welch v. U.S., 136 S. Ct. 1257 (2016), to assert that Hurst “place[s] certain murders ‘beyond the State’s power to punish,’” and is thereby substantive in nature. (Response at 22). Contrary to Davis’s assertion, Hurst does not change the definition of first-degree murder, nor exclude a class of persons from being subject to the death penalty. Rather, Hurst modifies the procedural steps required to impose the death penalty. The very case Davis relies on aptly illustrates the State’s point. In Welch, the United States Supreme Court held that striking the definition of “prior violent felony” in the Armed Career Criminal Act was a substantive change that must be applied retroactively. 136 S. Ct. at 1259. The United States Supreme Court explained that by striking the definition of a prior violent felony, “the same person engaging in the same conduct is no longer subject to the Act.” Id. at 1265. In contrast to Welch, Hurst did not change the definition of first-degree murder, but rather, changed the procedural requirements for determining the penalty for first-degree murder. As such, Hurst is plainly procedural in nature.

Davis acknowledges that the Eleventh Circuit has declined to extend Hurst retroactively in Lambrix v. Florida, 872 F. 3d 1170 (11th Cir. 2017), but he attempts to explain this ruling away as a product of a narrow standard of review. (Response at 22-23, fn. 3). However, the Eleventh Circuit’s ruling reached the merits of the retroactivity issue and clearly held that Hurst is not retroactive under federal law.

The opinion explained that denying Hurst retroactivity was in full accord with Ring and Schriro, 542 U.S. at 348. Lambrix, 872 F. 3d at 1182-83.

Here, just as in Hitchcock, Davis raises various constitutional provisions to argue that Hurst should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst does not apply retroactively to Davis. This case became final on June 15, 1998, which is well prior to the June 24, 2002, decision in Ring. As such, Hurst is not retroactive to this case. Thus, the Habeas Petition should be denied.

This Court's rulings in Asay and Hitchcock apply to Davis, and he has demonstrated no cause for this Court to recede from its lengthy case precedent. Because Davis's judgment and sentence were final prior to the decision in Ring, Hurst is not retroactive to him.

CONCLUSION

WHEREFORE, Respondents pray this Court deny Davis's Habeas Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Rick Sichta, Esq., rick@sichtalaw.com, and Suzanne Sichta, Esq., Suzanne@sichtalaw.com, Attorneys for Petitioner; this 6th day of November, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210.

/s/ Jennifer L Keegan

Counsel for Respondents

FLORIDA SUPREME COURT

500 South Duval Street
Tallahassee, Florida 32399

CASE NO.: SC17-1711
L.T. NO.: 16-1992-CF-13193

TONEY DERON DAVIS

v.

STATE OF FLORIDA

Petitioner.

Respondent.

**PETITIONER’S REPLY TO RESPONDENT’S REPLY TO RESPONSE TO
THIS COURT’S SEPTEMBER 27, 2017 HITCHCOCK SHOW CAUSE
ORDER**

RENEWED REQUESTS FOR BRIEFING AND ORAL ARGUMENT

Petitioner renews his requests that the Court permit untruncated briefing and grant oral argument.

ARGUMENT

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

The State is incorrect that Petitioner’s constitutional arguments are similar to those in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017). State’s Resp. at 7. Those cases did not explicitly address or reject *any* of the federal retroactivity arguments Petitioner raised in response to the order to show cause. *See* Petitioner’s Resp. at 16-34.

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, *Hitchcock*

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addressed arguments that “had already been considered and rejected in the *Asay V* opinion.” See State’s Resp. at 9; see also *Asay*, 210 So. 3d at 16 (“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 did not address the federal retroactivity arguments raised by Petitioner. *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 penalty or the Eighth Amendment’s requirement of reliability in capital sentencing. Further, *Asay* did not address whether the *Ring* retroactivity cutoff violates the Fourteenth Amendment’s Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are “substantive” under federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Hitchcock, in relying totally on *Asay*, also did not explicitly address or reject Petitioner’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

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).

summarily denying *Hitchcock*'s successive postconviction motion pursuant to *Asay*."). Indeed, in the entire *Hitchcock* opinion, the only language that addresses *any* constitutional rights is a single cursory statement: "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*." *Hitchcock*, 2017 WL 3431500, at *2) (emphasis added). Moreover, the *Hitchcock* Court's reference to "constitutional provisions" cannot be reasonably read to address Petitioner'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. *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 Petitioner 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 does not contend otherwise.

To the extent the State suggests that Petitioner’s federal arguments have been addressed in other cases, those decisions are not applicable here. As Petitioner noted in his initial response to the order to show cause, the Eleventh Circuit’s decision in *Lambrix v. Sec’y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), 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—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 Petitioner this Court’s recent active-death-warrant decisions in *Asay*

v. State, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017); *see also Hannon v. Sec’y, Fla. Dept. of Corr.*, M.D. Fla. No. 8:17-cv-02609-MSS-TGW (M.D. Fla. Nov. 8, 2017) (Martin, J., concurring).

II. This Court’s prior decisions in this case do not bar Petitioner from raising his federal constitutional right to retroactivity

For the same reasons as those in Part I, the Court’s prior decisions in this case do not bar Petitioner from raising his federal constitutional right to retroactivity in a separate habeas petition. While Petitioner previously filed an appeal of the denial of his successive 3.851 motion asserting *Hurst* retroactivity under state law, this Court has never dealt with the question of Petitioner’s right to *Hurst* retroactivity as guaranteed by the federal constitution, specifically the Eighth Amendment prohibition of arbitrary and capricious punishment and the Fourteenth Amendment rights to equal protection and due process, in this or any case.

III. The State’s cursory arguments are not persuasive

First, the State misreads Petitioner’s argument that the Fourteenth Amendment equal protection right requires *Hurst* to apply retroactively as arguing that retroactivity is required in “every case every time a change in the law occurred.” State’s Resp. at 6. Petitioner is speaking only to a class of similarly-situated defendants on collateral review. *See* Petitioner’s Resp. at 32-34. Under *Teague v. Lane*, 489 U.S. 288 (1989), courts look to whether a conviction was final

on the date of the new rule. *Id.* at 295. Here, the *Ring*-based cutoff takes a group of defendants whose decisions were final at the time of the *Hurst* decisions and grants and denies relief based on arbitrary factors. A *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness—and also denial of equal protection and due process of law—that is not present in typical circumstances where retroactivity is withheld based on pragmatic necessity for courts to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments.

A *Hurst* retroactivity cutoff at *Ring* causes capriciousness that exceeds the level justified by “normal” jurisprudence. For instance, Florida's pre-*Ring* prisoners and their post-*Ring* peers were both sentenced under a procedure that allowed death sentences based on factual findings not tested by a jury. But pre-*Ring* prisoners 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.

Pre-*Ring* prisoners also are more likely than their post-*Ring* counterparts to have been sent to death row under standards that would not produce a capital prosecution or sentence today. In the generation since *Ring*, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. And pre-*Ring* prisoners are more likely to have received death sentences in trials involving

problematic factfinding: 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.

This is especially true here, where the medical science used to determine the cause of death in this case has evolved and rendered the trial analysis completely defunct and sheds a whole new light on this case. Indeed, the victim may have died of natural causes. Furthermore, the State here withheld exculpatory evidence from trial counsel, such as multiple sources who could have confirmed that the child-victim exhibited vaginal bleeding and a bump on her head, weeks before her death. This Court acknowledged that such evidence should have been disclosed. *See Davis v. State*, 136 So. 3d 1169, 1185-86 (Fla. 2014). Thus, this case illustrates the many problems with flawed science, exacerbated by the prosecutorial misconduct that further casts the medical science used in this case into doubt, that is less likely to be tolerated in post-*Ring* trials. Taken together, these considerations show that a *Ring*-based retroactivity cutoff involves a level of caprice that exceeds that tolerated by standard retroactivity rules. A *Ring* cutoff’s denial of relief in precisely the class of cases in which relief makes the most sense is inconsistent

with the Eighth and Fourteenth Amendments.

The State’s assertion that the *Hurst* decisions were not substantive is equally unpersuasive. The State argues that *Welch v. United States*, 136 S. Ct. 1257 (2016), changed the definition of prior violent felony while *Hurst* did not change the definition of first-degree murder. The State fatally confuses the determination of the underlying crime with the determination of sentence eligibility. In *Welch*, the United States Supreme Court determined that its ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), striking the prior violent felony sentence enhancement language in the Armed Career Criminal Act as vague, applied retroactively. 136 S. Ct. at 1266. The decision affected the eligibility for an enhanced sentence rather than any underlying crime. Similarly, *Hurst* affected the categorization of those eligible for a death sentence. The State’s attempt to distinguish *Hurst* from *Welch* falls into the very trap the United States Supreme Court warned about in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016): “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.” *Id.* at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added).

The State also relies on *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), for the proposition that the United States Supreme Court’s ruling in that case—that

Ring is not retroactive in a federal habeas proceeding—means that *Hurst* is also not retroactive in any proceeding. *See* State’s Resp. at 11. But as Petitioner explained initially, *see* Petitioner’s Resp. at 21-22, 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. Indeed, *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.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard. The State attempts to distinguish *Ivan V. v. City of New York*, 407 U.S. 203 (1972), and *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), *see* State’s Resp. at 10-11. But even assuming, as the State suggests, that Florida’s scheme formerly incorporated the beyond-a-reasonable-doubt standard, that standard was misapplied to findings of fact made by the trial judge, not by the jury. The distinction between the holding of *Summerlin* and the retroactivity of *Hurst* because of the beyond-a-reasonable-doubt standard has already been observed. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (contrasting *Hurst* to *Ring* and *Summerlin*, because the latter decisions “did not address the

requirement for proof beyond a reasonable doubt,” and “[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive”).

IV. Fundamental fairness requires relief in this case

The State again relies on other unrelated and distinguishable cases to suggest that the fundamental fairness test applied in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), which requires relief where a defendant had previously raised a *Ring* claim, should not apply here. As Petitioner previously explained, *see* Petitioner’s Resp. at 9, 27 n.4, it is abundantly clear in this case that the sentencing judge relied on an HAC aggravator never considered by the jury. This did not apply in any of the other cases the State cites. *See* State’s Resp. at 9 n.6.

V. The State abandons any “harmless error” arguments

The State abandons any argument that the *Hurst* error in Petitioner’s case was harmless by failing to even reference the harmless error doctrine in its response. *See Hoskins*, 75 So. 3d at 257. As Petitioner argued in his initial filing, the *Hurst* error is not harmless under this Court’s precedent in light of the advisory jury’s non-unanimous recommendation.

CONCLUSION

For the reasons above and in Petitioner’s initial response to the Court’s order to show cause, this Court should hold that federal law requires the *Hurst* decisions to be applied retroactively and vacate Petitioner’s death sentence.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer Keegan at jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Rick Sichta
ATTORNEY



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FACT SHEET

UPCOMING EXECUTIONS

EXECUTION DATABASE

STATE-BY-STATE

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: May 15, 2018

Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 259

Number of prisoners who have obtained relief under *Hurst*: 128 (49.42%)

Number of prisoners who have been denied relief under *Hurst*: 131 (50.58%)

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendations of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Abdool, Dane	Orange	N	N	10-2	Y	4/6/17
Allred, Andrew	Seminole	N	WAIVED JURY		N	11/16/17
Alston, Pressley Bernard	Duval	Y	N	9-3	N	1/22/18
Altersberger, Joshua Lee	Highlands	N	N	9-3	Y	4/27/17
Anderson, Charles L.	Broward	N	N	8-4	Y	3/9/17
Anderson, Richard	Hillsborough	Y	N	11-1	N	1/26/18
Archer, Robin Lee	Escambia	Y	N	7-5	N	3/17/17
Armstrong, Lancelot Uriley	Broward	N	N	9-3	Y	1/19/17
Asay, Marc	Duval	Y	N	9-3, 9-3	N (EXECUTED)	12/22/16
Atwater, Jeffrey Lee	Pinellas	Y	N	11-1	N	1/23/18
Ault, Howard Steven	Broward	N	N	9-3, 10-2	Y	3/9/17
Bailey, Robert J.	Bay	N	N	11-1	Y	7/6/17
Baker, Cornelius	Flagler	N	N	9-3	Y	3/23/17
Banks, Donald	Duval	N	N	10-2	Y	4/20/17
Bargo, Michael Shane	Marion	N	N	10-2	Y	6/29/17
Barnhill, Arthur	Seminole	N	N	9-3	Y	2/20/17
Barwick, Darryl Brian	Bay	Y	Y	12-0	N	2/28/18
Bates, Kayle Barrington	Bay	Y	N	9-3	N	1/22/18
Beasley, Curtis W.	Polk	Y	N	10-2	N	1/23/18
Belcher, James	Duval	N	N	9-3	Y	11/2/17
Bell, Michael	Duval	Y	Y	12-0, 12-0	N	1/29/18
Bevel, Thomas	Duval	N	N	8-4, 12-0	Y*	6/15/17
Booker, Stephen Todd	Duval	Y	N	8-4	N	1/30/18

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.

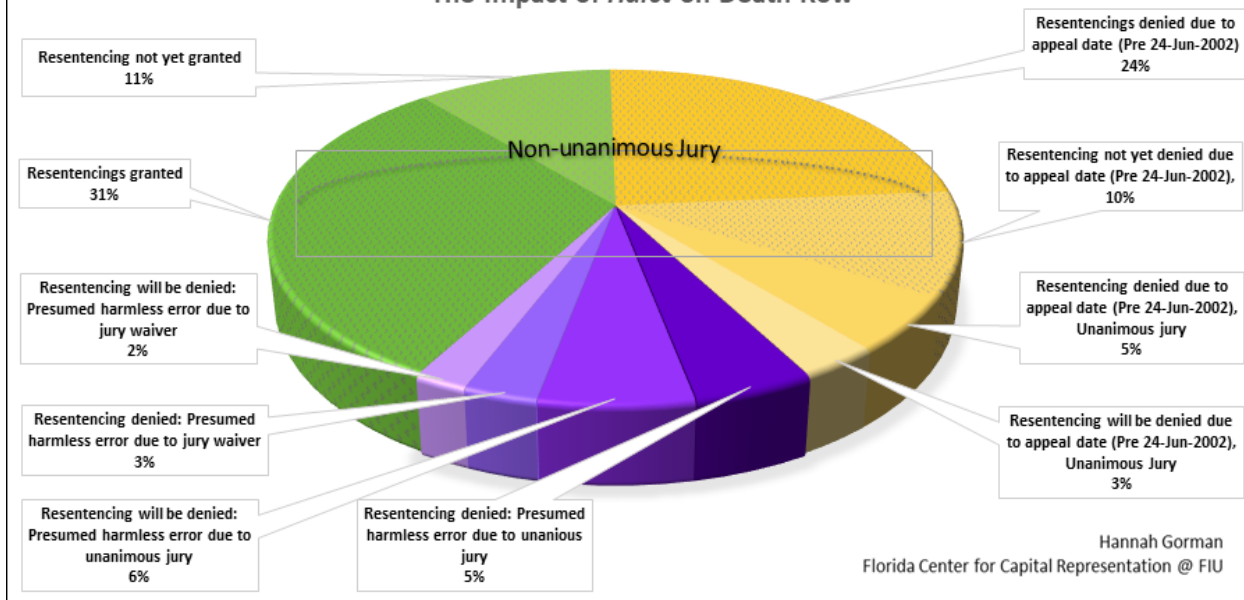
** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. 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



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)