

EXHIBIT 1

Supreme Court of Florida

No. SC17-1080

FLOYD WILLIAM DAMREN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 2, 2018]

PER CURIAM.

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

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

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

After reviewing Damren's response to the order to show cause, as well as the State's arguments in reply, we conclude that Damren is not entitled to relief. Damren was sentenced to death following a jury's unanimous recommendation for death. Damren v. State, 696 So. 2d 709, 710 (Fla. 1997). Damren's sentence of death became final in 1998. Damren v. Florida, 522 U.S. 1054 (1998). Thus, Hurst does not apply retroactively to Damren's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Damren's motion.

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

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

PARIENTE, J., concurring in result.

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

An Appeal from the Circuit Court in and for Clay County,
Michael Scott Sharrit, Judge - Case No. 101994CF000537XXAXMX

Robert S. Friedman, Capital Collateral Regional Counsel, Karin L. Moore and
Stacy R. Biggart, Assistant Capital Collateral Regional Counsel, Northern Region,
Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Senior Assistant
Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-1080

Lower Tribunal No(s):
101994CF000537XXAXMX

FLOYD WILLIAM DAMREN

vs. STATE OF FLORIDA

Appellant(s)

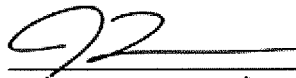
Appellee(s)

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

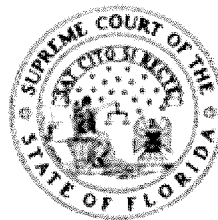
Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



tw

Served:

STACY BIGGART
KARIN L. MOORE
CHARMAINE M. MILLSAPS

EXHIBIT 3

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

CASE NO.: 10-1994-CF-00537-AXXX

DIVISION: A

STATE OF FLORIDA

v.

FLOYD WILLIAM DAMREN,
Defendant.

2017 MAY -5 AM 10:23

FILED
J. E. Green Clerk Clay

**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POST-CONVICTION
RELIEF IN LIGHT OF HURST v. FLORIDA**

This matter came before the Court on Defendant's "Motion for Post-Conviction Relief in light of Hurst v. Florida, filed by counsel on January 11, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On March 3, 2017, the State filed its Answer to "Damren's Successive Motion for Post Conviction Relief."

A defendant must file a rule 3.851 motion within one year of his or her conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A court may consider a rule 3.851 motion beyond the one-year time-bar, if it alleges "the fundamental constitutional right asserted was not established within the [one-year] period provided for in subsection (d)(a) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). A postconviction claim asserted more than a year after Defendant's convictions and sentence of death became final must be denied unless Defendant's instant claim falls within the retroactive constitutional right exception.

The facts of this case were presented in the Florida Supreme Court's opinion, Damren v. State, 696 So. 2d 709, 710-711 (Fla. 1997). Defendant's convictions and sentence of death became final on January 12, 1998, when the United States Supreme Court issued its order denying Defendant's petition for writ of certiorari. Damren v. Florida, 522 U.S. 1054 (1998). On January 23, 2003, the Florida Supreme Court affirmed the trial court's denial of Defendant's motion for Postconviction relief under Florida Rule of Criminal Procedure 3.851 and denied Defendant's writ of habeas corpus. Damren v. State, 838 So. 2d 512, 514 (Fla. 2003).

In the instant Motion, Defendant alleges he is entitled to relief because his death sentence violates the Sixth and Eighth Amendments pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). Defendant alleges he is entitled to retroactive application of both Hurst v. Florida and Hurst v. State under the fundamental fairness doctrine. Defendant requests this Court to either vacate his death sentence, impose a life sentence, or conduct a new penalty phase in accordance with the Hurst decisions.

Hurst v. Florida

Defendant's first claim relates to Hurst v. Florida. There the Supreme Court concluded Florida's capital sentencing scheme was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). The Supreme Court explained, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Hurst v. Florida, 136 S. Ct. at 619.

Defendant alleges he is entitled to retroactive relief because Defendant properly asserted, presented, and preserved challenges to the lack of jury fact finding. The Florida Supreme Court held that Hurst v. Florida, should not apply retroactively to cases that were final when Ring was decided. Asay v. State, 210 So. 3d 1, 16 (Fla. 2016). Ring was decided on June 24, 2002. Defendant's convictions and sentence of death became final in 1998; four years before the Court

issued its decision in Ring. Consequently, Defendant is not entitled to relief pursuant to Hurst v. Florida.

Hurst v. State

Defendant's second claim rests on the Florida Supreme Court's decision in Hurst v. State. The Florida Supreme Court held, "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst v. Florida, 202 So. 3d at 53. The court further held the jury's findings must be unanimous. Id. at 54. Additionally, the court held "for death sentence to be imposed, the jury's recommendation for death must be unanimous." Id.

As with Defendant's previous claims, he is not entitled to relief because Asay prohibits retroactive application of Hurst v. State. Asay, 210 So. 3d at 13; see Mosely v. State, 209 So. 3d 1248 (Fla. 2016). Moreover, in the instant case, the jury voted unanimously for death. Damren v. State, 696 So. 2d at 710.

Fundamental Fairness

Defendant claims fundamental fairness would support retroactive application of Hurst v. Florida and Hurst v. State. At trial, Defendant challenged the constitutionality of the death sentence because the jury was not required to identify the aggravators it found and the jury performed only an advisory role.

In Gaskin v. State, SC15-1884, 2017 WL 224772, (Fla. Jan. 19, 2017), the defendant sought relief in a successive motion for Postconviction relief pursuant to the Hurst decisions. Like Defendant, Gaskin challenged the constitutionality of Florida's capital sentencing scheme at trial and on direct appeal for the reasons espoused in Ring. Id. at 2. (Pariente, J., concurring in

part and dissenting in part). The Supreme Court, citing Asay, denied the defendant relief under Hurst v. Florida and Hurst v. State because the defendant's sentence became final before Ring. Id.

The Supreme Court in Asay, Mosley, and Gaskin bars retroactive application of the Hurst decisions to capital cases that became final before Ring. Therefore, Defendant's Hurst claims do not fall within the retroactive constitutional right exception in 3.851(d)(2)(B) because his sentence became final on 1998.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Successive Motion to Vacate Death Sentence is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date of this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers, at Green Cove Springs, Clay County, Florida, on this 30th day of May, 2017.



MICHAEL S. SHARRIT
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Defendant by United States mail on this 5 day of May, 2017.



H. Castaldi
Deputy Clerk

Copies to:

Office of the State Attorney
Division: A

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Case No.: 10-1994-CF-537
/mfg

EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA

FLOYD WILLIAM DAMREN,
Appellant,

vs.

CASE NO. SC17-1080

STATE OF FLORIDA,
Appellee.

_____ /

RESPONSE TO ORDER TO SHOW CAUSE

Appellant's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). A core issue in this case is whether this Court should apply its "retroactivity cutoff" to deny Appellant *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has created a state-law retroactivity cutoff at the date *Ring* was decided—June 24, 2002. The cutoff is unconstitutional and should not be applied to Appellant. Denying Appellant *Hurst* relief because his sentence became final in 1998, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.¹

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

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

This appeal presents important issues: whether federal and state law require this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than restricting *Hurst* relief to post-*Ring* death sentences. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Appellant also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.² Appellant is entitled to a fair opportunity to show why the constitution prohibits his execution. *Hall v Fla.*, 134 S. Ct. 1986, 2001 (2014).

ARGUMENT

I. Appellant's death sentence violates *Hurst v. Florida* and *Hurst v. State*.

Appellant was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then

² Depriving Appellant full briefing would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Supreme Court held that the jury, not the judge, must make the findings required to impose death. *Id.*

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

Appellant's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a generalized recommendation for death after deliberating for forty minutes.³ R. 973, 975. The record does not reveal whether Appellant's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation.

II. This Court's "retroactivity cutoff" at *Ring* is unconstitutional.

³ In fact, the jury was advised that a death sentence was warranted if the mitigation did not outweigh the aggravating circumstances. R. 688.

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 *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Appellant the same *Hurst* relief being granted in scores of materially indistinguishable collateral-review cases. Denying Appellant *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.⁴

A. This Court’s retroactivity cutoff violates the Eighth and Fourteenth Amendments.

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

⁴ This Court is obligated to meaningfully address Appellant’s federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a “valid excuse”).

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.⁵

⁵ 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

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring* retroactivity approach include whether a resentencing was granted. Under the 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.⁶

B. Appellant's death sentence is fundamentally unfair under *Hurst v. State*, *Mosley v. State*, *James v. State* and Art. I, sections 2, 9, and 22 of the Florida Constitution.

States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). Mr. Bowles's sentence, however, became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. Mr. Bowles, on the other hand, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the pre-*Ring* side of this Court's current retroactivity cutoff.

⁶ *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Appellant, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Appellant would not.

Under the Court's current approach, 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 direct appeal posture. *See, e.g., Damren v. State*, 838 So. 2d 512, 520-521, 521 n.2 (Fla. 2003); *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*, such as Appellant, should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g., James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but 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."). Justice Pariente, who has maintained that *Hurst* should be given full retroactivity to all death row inmates, found Justice Lewis' approach to retroactivity under *James* preferable to denying relief to those who had raised the issue prior to *Ring*. *See Asay v. State*, 210 So. 3d 1, 32-37 (Pariente, J., concurring in part and dissenting in part) *Hitchcock* at 3-6 (Pariente J., dissenting) and *Gaskin v. State*, 218 So. 3d 399, 401-404 (Pariente, J., concurring in part and dissenting in part).

In *Mosley*, this Court focused its fundamental fairness analysis on whether it would be unfair to bar Mr. Mosley from seeking *Hurst* relief, regardless of when his sentence became final, by virtue of the fact that he had previously attempted to challenge Florida's unconstitutional sentencing scheme and was "rejected at every turn" under the Florida Supreme Court's flawed pre-*Hurst* law. *Id.* at 1275. In assessing fundamental fairness, this Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst v. Florida* and *Hurst v. Florida* were decided. See *Mosley* at 1275. If Mosley had raised such a challenge, this Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in the *Hurst* decisions. See *id.* This Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State's interest in finality of death sentences. *Id.* ("In this instance...the interests of finality must yield to fundamental fairness.").

Here, as in *Mosley*, the *Hurst* decisions should be retroactive under the fundamental fairness doctrine. Although Appellant's trial and direct appeal were pre-*Ring*, he attempted to challenge Florida's unconstitutional capital sentencing statute before both the *Ring* and *Hurst* decisions. Before trial, Appellant filed pretrial motions raising *Ring* and *Hurst*-like challenges to the operation of Florida's "advisory" capital-sentencing jury system, including under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), and also

challenged Florida's lack of a unanimous verdict on all the elements required to impose death as unconstitutional.⁷ (R. 77-90) Under the rationale of *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Appellant, regardless of the fact that his sentence became final before the issuance of *Ring*. See *Mosley*, 209 So. 3d at 1276 n.13.

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); 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

⁷ Defense counsel presciently filed various pre-trial motions and requests for special jury instructions challenging the state and federal constitutionality of Florida's “trifurcated” sentencing procedures (R. 37-62), including attacks on the ease that trial courts overrode juries' life recommendations, *id.*, the failure of this Court to require advance designation of aggravating circumstances the State would rely upon in seeking death sentences (R. 76-78), the failure of this Court to require that the State prove beyond a reasonable doubt that aggravators outweigh mitigation, the failure of this Court to require unanimous jury recommendations for death (R. 78, 87), the failure of this Court to instruct the jury that their recommendations carried great weight (R. 651), and this Court's instruction to the jury that they should base their recommendation on whether “sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh” those aggravating circumstances (R. 652).

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 Appellant violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state-created right to direct appeal); *Hicks*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state competency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *Evitts*, 469 U.S. at 393 (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.

III. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review

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

The *Montgomery* Court found the *Miller* rule substantive 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.

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

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders “beyond the State’s power to punish,” *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on” the judge-sentencing scheme. *Id.* The “unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*,” *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state’s power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters. . . the class of persons that the law punishes”).

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida’s, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself “[made] a certain fact essential to the death penalty . . . [the change] would be substantive.” 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that “sufficient aggravating factors

exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” 136 S. Ct. at 622 (internal citation omitted). Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and proof-beyond-a-reasonable-doubt decisions are substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).⁸

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

The “harmless error” doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury’s unanimous recommendation to sentence Appellant to death.⁹ This Court’s per se rule that *Hurst* errors are harmless in every

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

⁹ *Hurst* errors should be deemed “structural” and not subject to harmless review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991).

case where the pre-*Hurst* jury unanimously recommended death, *see, e.g., Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Appellant's jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law. This Court cannot reliably infer from the jury's recommendation whether the jury unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all the other requisite elements for a death sentence. There is a reasonable probability that individual jurors based their overall recommendation for death on a different underlying calculus. *See Hall v. State*, 212 So. 3d 1001, 1037 (Quince, J., dissenting).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Appellant's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. The trial court even refused to instruct the jury that he was required to give great weight to the jury's recommendation. R. 651, 688. The jury deliberated for 40 minutes. R. 973, 975. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. Without the *Hurst* error, where the jury was

properly apprised of its fact-finding role, there is a reasonable likelihood that it would have afforded greater weight to Appellant's mitigation. As such, the Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding.¹⁰ *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (Eighth Amendment is violated when there is uncertainty about jury's vote).

The jury's recommendation in Appellant's case also does not account for the possibility that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation at the penalty phase would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty. This stands against a harmless error ruling without at least remanding to afford Appellant a hearing, where the effect of the error on counsel could be addressed.

As a matter of federal constitutional law, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that "harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict."). In Appellant's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a

¹⁰ Proper judicial review measures the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated in *Boyde v. California*, 494 U.S. 370 (1990).

reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

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

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

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

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that “the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” 508 U.S. at 278. “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476. Any reliance upon the jury recommendation requires the

underpinnings of the recommendation to be made beyond a reasonable doubt. Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard.

To the extent any aggravators applied to Appellant were based on prior convictions, those aggravators do not render the *Hurst* error harmless. Florida law requires fact-finding as to the "sufficiency" of the aggravators to warrant death. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Appellant and remand for a hearing concerning the effect of the error on counsel, or a new penalty phase, and/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 at charmaine.millsaps@myfloridalegal.com, capapp@myfloridalegal.com, Floyd Damren by U. S. Mail delivery at Union Correctional Institution, P. O. Box 1000, Raiford, FL.

/s/ Karin L. Moore
Karin L. Moore

EXHIBIT 5

In the Supreme Court of Florida

FLOYD WILLIAM DAMREN,

Appellant,

v.

CASE NO.: SC17-1080
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

STATE'S REPLY TO ORDER TO SHOW CAUSE

On September 27, 2017, this Court issued an order to Appellant to show cause "why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445." Under this Court's decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017), Damren is not entitled to any *Hurst* relief because his sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This Court has repeatedly rejected the same constitutional attacks opposing counsel presents in the response. In sum, *Asay* and *Hitchcock* control. This Court should once again follow its well-established precedent and affirm the trial court's summary denial of the successive postconviction motion.

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Procedural history of the *Hurst* claim

Damren's death sentence became final on January 12, 1998, when the United States Supreme Court denied his petition for writ of certiorari in the direct appeal. *Damren v. Florida*, 522 U.S. 1054 (1998).

On January 11, 2017, Damren, represented by Karen L. Moore of Capital Collateral Regional Counsel - North, filed a successive postconviction motion raising a Sixth Amendment right-to-a-jury-trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), in the state trial court. The State filed an answer to the successive postconviction motion. The State, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Gaskin v. State*, 218 So.3d 399 (Fla. 2017), asserted that *Hurst II* did not apply to Damren because his sentence was final years before *Ring* was decided. On May 3, 2017, the trial court summarily denied the successive postconviction motion citing *Asay* and *Gaskin*.

Damren then appealed the denial of his successive postconviction *Hurst* motion to this Court. *Damren v. State*, SC17-1080. On September 27, 2017, this Court issued an order for Damren to show cause why *Hitchcock* does not control. On October 17, 2017, Damren filed his response. This is the State's reply to the response to the order to show cause.¹

¹ This Court's order limited Appellant's response to 20 pages and his reply to 10 pages. Opposing counsel complains about these page limitations and advocates for "full" briefing. Page limitations do not violate due process. *Henry v. State*, 937 So.2d 563, 575-76 (Fla. 2006) (concluding that courts may impose

Merits

Under this Court's well-established controlling precedent, *Hurst* is not retroactively applicable to Damren because his death sentence became final in 1998. *Damren v. Florida*, 522 U.S. 1054 (1998).

In *Asay v. State*, 210 So.3d 1, 11-22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 2017 WL 1807588 (Aug. 24, 2017), this Court held that any capital defendant whose death sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002 was not entitled to *Hurst* relief. This Court performed a full retroactivity analysis using the state test of *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Asay*, 210 So.3d at 15-22.

This Court reaffirmed its holding in *Asay* in *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017). This Court in *Hitchcock* rejected several constitutional challenges to its non-retroactivity rule reaffirming its prior holding in *Asay*. Opposing counsel in his response to the order to show cause makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in *Hitchcock*, *Asay VI*, and *Lambrix*. *Hitchcock*, 2017 WL 3431500 at *2; *Asay v. Jones*, 2017 WL 3472836, *6 (Fla. Aug. 14, 2017) (*Asay VII*) (denying an Eighth Amendment challenge to the

reasonable page limits on petitions for extraordinary writs quoting *Basse v. State*, 740 So.2d 518, 519 (Fla. 1999), and citing *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla.1996), as well as noting that the federal courts also impose page limitations in capital cases quoting *United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998)). This argument also overlooks the facts the State was limited to 15 pages in its reply. Appellant was granted double the pages compared to the State.

holding in *Asay*); *Lambrix v. State*, 2017 WL 4320637, *1-*2 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in *Asay* citing *Hitchcock* and *Asay VI*). This Court should again reject these various constitutional challenges for the same reasons.²

Moreover, this Court has explicitly followed *Asay* in a number of capital cases which are now final.³ This Court recently affirmed that holding yet again in several cases including in two active death warrant cases. *Jones v. State*, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017) (denying *Hurst* relief citing *Asay*); *Asay v. State*, 2017 WL 3472836 (Fla. Aug. 14, 2017) (*Asay VI*) (same in active warrant); *Lambrix v. State*, 2017 WL 4320637 (Fla. Sept. 29, 2017) (same in active warrant). So, since December of 2016 and as recently as September of 2017, this Court has consistently followed *Asay*. This Court has repeatedly held in numerous capital cases including active warrant cases that *Hurst* does not apply retroactively to

² The Eleventh Circuit has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule established in *Asay* recently in *Lambrix v. Sec'y, Fla. Dep't of Corr.*, __ F.3d __, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017).

³ *Bogle v. State*, 213 So.3d 833, 855 (Fla. 2017) (denying *Hurst* relief citing *Asay*); *Lambrix v. State*, 217 So.3d 977, 989 (Fla. March 9, 2017), *rehearing denied*, SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying *Hurst* relief citing *Asay*); *Lukehart v. Jones*, 2017 WL 1033691 (Fla. March 17, 2017) (denying *Hurst* relief citing *Asay*); *Oats v. Jones*, 2017 WL 2291288 (Fla. May 25, 2017) (denying *Hurst* relief citing *Asay*); *Rodriguez v. State*, 219 So.3d 751, 760 (Fla. April 20, 2017), *rehearing denied*, SC15-1795, 2017 WL 2598492 (Fla. June 15, 2017) (denying *Hurst* relief citing *Asay*).

defendants like Damren. *Asay* is firmly established precedent. *Asay* and *Hitchcock* control.

Federal retroactivity of *Hurst*

While opposing counsel insists that *Hurst* is retroactive under federal law, it is not. The United States Supreme Court has held that *Ring* was not retroactive in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989)). The *Summerlin* Court relied heavily on its prior holding in *DeStefano v. Woods*, 392 U.S. 631 (1968), which held the case that first extended the Sixth Amendment right-to-a-jury-trial to the states, was not retroactive. The Court reasoned that “if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.” *Summerlin*, 542 U.S. at 357. And, if a case is not retroactive under the broader state test for retroactivity of *Witt*, which this Court used in *Asay*, it is certainly not retroactive under the narrower federal test for retroactivity of *Teague*. See *Asay*, 210 So.3d at 15 (describing *Witt* as “more expansive” than *Teague* citing *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005)).

The Eleventh Circuit recently held that *Hurst* is not retroactive under federal law. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) (“under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review” citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)), *cert. denied*,

Lambrix v. Jones, 17-5153, 2017 WL 3008927 (Oct. 2, 2017); *Lambrix v. Sec’y, Fla. Dep’t of Corr.*, ___ F.3d ___, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017) (concluding this Court’s holding in *Asay* to be “fully in accord with the U.S. Supreme Court’s precedent in *Ring* and *Schriro*”), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017). The Eleventh Circuit’s decision in *Lambrix* is definitive precedent that *Hurst* is not retroactive in federal court. Additionally, the Eleventh Circuit had previously held that *Ring* was not retroactive under *Teague*. *Turner v. Crosby*, 339 F.3d 1247, 1282-86 (11th Cir. 2003) (performing a full *Teague* analysis of *Ring*). And if the seminal case is not retroactive, then neither is its progeny. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing “if *Apprendi*’s rule is not retroactive on collateral review, then neither is a decision applying its rule”). *Hurst II* is not retroactive under federal law.

Furthermore, the Supremacy Clause does not require states to adopt *Teague*. States are free to adopt their own broader retroactivity tests. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008); *Montgomery v. Louisiana*, 136 S.Ct. 718, 728-29 (2016) (explaining that, under *Danforth*, states are free to have broader, but not narrower, retroactivity tests if a new substantive rule of constitutional law is involved).

The United States Supreme Court in *Montgomery* did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at a couple of points in its discussion. *Id.*, 136 S.Ct. at 723, 728. The United States Supreme Court in *Montgomery* explained that the federal constitution requires that new

substantive rules be applied retroactively. *Montgomery*, 136 S.Ct. at 728. The *Montgomery* Court then defined substantive as “rules forbidding criminal punishment of certain primary conduct,” as well as “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Id.* The United States Supreme Court in *Summerlin*, a retroactivity case, defined substantive as a new rule that places “particular conduct or persons” “beyond the State's power to punish.” *Summerlin*, 542 U.S. at 352.

Opposing counsel insists that *Hurst II* is retroactive under federal law because, he claims, the right to a jury trial is a substantive right. But, according to the United States Supreme Court, the right to a jury trial is a procedural right, not a substantive right. The United States Supreme Court specifically observed in a retroactivity case that “*Ring*’s holding is properly classified as procedural” because the Sixth Amendment’s jury-trial guarantee “has nothing to do with the range of conduct a State may criminalize.” *Summerlin*, 542 U.S. at 353. The *Summerlin* Court explained that rules that allocate decisionmaking authority between the judge and the jury “are prototypical procedural rules.” *Id.* The Supreme Court noted that they had classified the right to a jury trial as procedural “in numerous other contexts.” *Id.* at 353-54 (citing numerous cases). While the opposing counsel may view the right to a jury trial as substantive, the United States Supreme Court has repeatedly classified it as procedural and in very similar situations. So, *Hurst* is not substantive under *Montgomery*.

Montgomery does not apply at all. And the state test for retroactivity of *Witt*

does not employ the substantive/procedural distinction as a factor. Opposing counsel is really mixing and matching parts of the federal test for retroactivity with the state test for retroactivity. She is tangling *Teague* with *Witt*. But the United States Supreme Court in *Danforth* held that states are not required to adopt the federal test for retroactivity. And, under the state test of *Witt*, this Court has already granted many more capital defendants *Hurst* relief than would have received relief under the federal test of *Teague*.

Opposing counsel's reliance on *Welch v. United States*, 136 S.Ct. 1257 (2016), is even more misplaced. *Welch* concerned the retroactivity of a statutory interpretation case, not the Sixth Amendment right-to-a-jury-trial. *Welch* involved a federal criminal statute, not the federal constitution. And *Welch* certainly did not overrule *Summerlin* or *DeStefano*.

And *Ivan V. v. City of New York*, 407 U.S. 203 (1972), is irrelevant to any retroactivity analysis in Florida. If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades.⁴ In neither *Hurst v. Florida* or *Hurst II*

⁴ *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating

was the standard of proof at issue. The issue in *Hurst v. Florida* was who decides — the judge versus the jury — not the standard of proof. The new unanimity requirement established by this Court in *Hurst II* is not the equivalent of a standard of proof. They are two very different concepts. The “retroactivity” of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well.

Opposing counsel misreads *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). The Delaware Supreme Court in *Powell* distinguished Florida law as announced by this Court in *Hurst II* from Delaware law as announced in *Rauf v. State*, 145 A.3d 430 (Del. 2016), pointing out that Florida law did not involve a change in the standard of proof. *Powell*, 153 A.3d at 73-74 (stating that “unlike *Rauf*,” *Hurst II* did not involve “a lower burden of proof”). Nor would the United States Supreme Court agree with the Delaware Supreme Court about a standard of proof applying to weighing, much less that *Teague* or *Ivan V.* mandates retroactive application of any such new standard.⁵ While the Delaware Supreme Court is free to apply its

circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven “beyond a reasonable doubt”); *Cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven “beyond a reasonable doubt”).

⁵ *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (expressing doubt whether it is even possible to apply a standard of proof to either mitigation or weighing and opining that weighing is “mostly a question of mercy,” not a fact); *Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (holding that a death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances because no particular “method for balancing mitigating

Rauf decision retroactively under state law under *Danforth*, the United States Supreme Court would never agree that federal constitutional law mandates that *Rauf* be applied retroactively. Such an argument is directly contrary to *Danforth* itself. *Powell*, a state case involving a change in Delaware law, certainly does not establish that federal constitutional law mandates the retroactivity of *Hurst II*, especially not in the face of United States Supreme Court precedent and Eleventh Circuit precedent to the contrary. *Hurst* simply is not retroactive under federal law.

Due Process, the Eighth Amendment, and Equal Protection

Opposing counsel insists that the cut-off date of 2002 created in *Asay* is arbitrary in violation of the fundamental fairness required by due process, the Eighth Amendment, and equal protection. This Court has rejected those same arguments in *Asay VI* and *Lambrix*. *Asay*, 2017 WL 3472836 at *6 (*Asay VI*); *Lambrix*, 2017 WL 4320637 at *1-*2 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in *Asay* citing *Hitchcock* and *Asay VI*). Indeed, many of these same arguments were made

and aggravating factors in a capital sentencing proceeding is constitutionally required"); *Kansas v. Marsh*, 548 U.S. 163, 187, n.2 (2006) (Scalia, J., concurring) (observing that the federal Constitution does not require a reasonable doubt standard as to the weighing process). Because the United States Supreme Court does not even view weighing as a fact that is subject to any standard of proof, the High Court would never reach the issue of retroactivity under *Ivan V*.

by the dissenters in *Asay* itself but rejected by the majority.⁶ The majority in *Asay* drew the cut-off in full awareness of these arguments.

As to fundamental fairness, due process does not require courts abandon all retroactivity analysis and apply all new rules to all cases. Such an argument negates all finality in the criminal law and it is finality that is the overriding concern in any retroactivity analysis including in capital cases. *Penry v. Lynaugh*, 492 U.S. 302 (1989). As the *Penry* Court observed, the overriding concern of finality that underlies retroactivity is just as “applicable in the capital sentencing context.” *Id.* at 314.

Furthermore, both federal and state courts have retroactivity doctrines that depend on dates. For example, a cut-off date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending

⁶ *Asay*, 210 So.3d at 31 (Lewis, J., concurring) (“Florida will treat similarly situated defendants differently – here, the difference between life and death – for potentially the simple reason of one defendant’s docket delay” and characterizing the majority’s cut-off date based on *Ring* as being “arbitrary”); *Asay*, 210 So.3d at 35-35 (Pariente, J., dissenting) (stating that *Hurst II* is that “rare situation in which finality yields to fundamental fairness” and that the majority’s rule results in “arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced” and taking the view that to “avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida’s capital sentencing,” “*Hurst* should be applied retroactively to all death sentences”); *Asay*, 210 So.3d at 37 (Perry, J., dissenting) (“the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons”).

on direct review. See also *Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). *Griffith* depends on the date of finality of the direct appeal. The current federal test for retroactivity, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the exception to *Teague* applies. The date of finality is the critical date-based toggle under *Teague*.

Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development in the law is part and parcel of the landscape of retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. Neither *Griffith* nor *Teague* nor *Asay* violates due process. Retroactivity analysis itself is not fundamentally unfair in violation of due process.

As to Equal Protection, it is doubtful that Equal Protection analysis even applies to judicial decisions, such as *Asay*, as opposed to statutes. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (using due process, not equal protection, when a judicial decision is at issue). But even assuming it does, such an argument makes little jurisprudential sense. A cut-off date does not create a protected class and there is no fundamental right involved. The date of the finality of a defendant's sentence is not an immutable characteristic requiring application of

strict scrutiny or intermediate scrutiny. The only possible standard of review, under equal protection principles, would be rational basis review. And the cut-off date of *Ring* established by this Court in *Asay* more than satisfies rational basis review. Again, all retroactivity analysis depends on cut-off dates. All retroactivity analysis creates two groups of defendants — one of whom received benefit of the new rule and another group that does not — and it creates those groups based on a court date. Every major case would have to be applied retroactively under this view of equal protection with the result of negating all finality.

There are no limits to opposing counsel's equal protection attack on this Court's decision in *Asay*. According to opposing counsel's logic, all retroactivity tests violate equal protection. The Equal Protection Clause does not mandate that every major change in the law be applied retroactively, which would be the necessary outcome of adopting this view. Neither *Asay* nor *Griffith* nor *Teague* violates equal protection.

In sum, *Asay V*, *Hitchcock*, *Asay VI*, and *Lambrix* control.⁷

⁷ Even if *Hurst* applied retroactively, which it does not, *Damren* would not be entitled to any *Hurst* relief because any *Hurst* error was harmless. *Damren's* jury unanimously recommended a death sentence. *Damren v. State*, 696 So.2d 709, 710 (Fla. 1997) ("The jury voted unanimously for death"); *Damren v. Florida*, 776 F.3d 816, 818 (11th Cir. 2015) (noting the jury unanimously recommended a death sentence), *cert. denied*, 137 S.Ct. 830 (2017). Under this Court's well-established precedent of *Davis v. State*, 207 So.3d 142 (Fla. 2016), if the jury unanimously recommends a death sentence, then any *Hurst* error is harmless.

This Court held that *Hurst* error is not structural error. Rather, *Hurst* error is subject to harmless error analysis. *Hurst II*, 202 So.3d at 66-68 (rejecting an argument that *Hurst* was structural error citing *Neder v. United States*, 527 U.S. 1, 7-8 (1999); *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006); and *Galindez*

v. State, 955 So.2d 517, 522 (Fla. 2007)); see also *Galindez*, 955 So.2d at 522-23 (holding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), error is not structural error).

The United States Supreme Court has also held that the jury's failure to find an element is not structural error. *Neder v. United States*, 527 U.S. 1, 8 (1999). In *Neder*, the jury was instructed not to even consider the element of materiality at all. If *Neder* error is not structural error, *Hurst* error certainly is not. Furthermore, the United States Supreme Court has also held that *Apprendi* error is not structural error. *Washington v. Recuenco*, 548 U.S. 212 (2006). If *Apprendi* error is not structural, then neither is the closely-related *Hurst* error.

Because *Ivan V.* does not apply at all to any Florida case, as explained above, it does not change any of this Court's analysis in *Hurst II* regarding structural error.

Hurst error is subject to harmless error analysis and would be harmless in this case due to the unanimous jury recommendation. But there is no need to reach the issue of harmlessness, because *Hurst II* does not apply retroactively to *Damren*.

Accordingly, this Court should affirm the trial court's denial of the successive postconviction motion.

Respectfully submitted,
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COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S REPLY TO ORDER TO SHOW CAUSE has been furnished by electronic mail via e-portal to Assistant Capital Collateral Regional Counsel - North Karen L. Moore; 1004 DeSoto Park Drive, Tallahassee, FL, 32301-1300; phone: (850) 487-0922 ext 104; email: Karen.moore@ccrc-north.org this 24th day of October, 2017.

/s/ Charmaine M. Millsaps
Charmaine M. Millsaps
Attorney for the State

EXHIBIT 6

IN THE SUPREME COURT OF FLORIDA

FLOYD WILLIAM DAMREN,
Appellant,

v.

CASE NO. SC17-1080

STATE OF FLORIDA,
Appellee.

_____ /

APPELLANT'S REPLY¹

I. The State is incorrect in asserting that *Hitchcock* addressed the federal retroactivity arguments Appellant raises in this proceeding

The State is incorrect that Appellant “makes many of the same Eighth Amendment, equal protection, and due process arguments explicitly rejected by this Court in *Hitchcock*, *Asay IV*, and *Lambrix*.” State’s Resp. at 3. This Court’s decision in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), did not explicitly address or reject *any* of the federal retroactivity arguments Appellant raised in response to the order to show cause. *See* Appellant’s Resp. at 4-19.

This Court’s opinion in *Hitchcock* relied exclusively on the reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). As the State acknowledges, the Court’s decision in *Asay* rested entirely on the state retroactivity law articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* State’s Resp. at 3 (“In *Asay* . . . [t]his Court performed a full retroactivity analysis using the state test of *Witt*”); *see also Asay*, 210 So. 3d at 16 (“To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant

¹ Appellant renews his requests that the Court permit untruncated briefing.

to the dictates of *Witt*.”).² *Asay* did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Appellant’s response to the order to show cause in this proceeding. Namely, *Asay* did not address whether a retroactivity “cutoff” drawn at *Ring* violates the Eighth Amendment’s prohibition against arbitrary and capricious imposition of the death penalty or the Fourteenth Amendment’s Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are “substantive” within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Hitchcock, in relying totally on *Asay*, also did not explicitly address or reject Appellant’s federal retroactivity arguments. *See Hitchcock*, 2017 WL 3431500, at *1 (“We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief.”); *id.* at *2 (“Accordingly, we affirm the circuit court’s order summarily denying *Hitchcock*’s successive postconviction motion pursuant to *Asay*.”). The State’s response here attempts to highlight the conclusory sentence in *Hitchcock* that reads: “Although *Hitchcock* references various *constitutional provisions* as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*.”

² 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).

State's Resp. at 4 (citing *Hitchcock*, 2017 WL 3431500, at *2) (emphasis added). But the *Hitchcock* Court's reference to "constitutional provisions" cannot be reasonably read to address Appellant's federal retroactivity arguments, as the very next sentence in *Hitchcock* reads: "As such, these arguments were rejected when we decided *Asay*."). *Hitchcock*, 2017 WL 3431500, at *2. As explained above, *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 Appellant does here, advanced federal retroactivity arguments under the Eighth and Fourteenth Amendments, as well as the Supremacy Clause and *Montgomery*. If this Court had intended to put those arguments to rest in *Hitchcock*, it could have done so. But any fair reading of *Hitchcock* leads to the conclusion that those issues remain unresolved in light of the Court's wholesale reliance on *Asay*. Indeed, *Hitchcock* neither mentions the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, nor the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery* or otherwise explain why the Supremacy Clause does not require the substantive rules announced in the *Hurst* decisions to be retroactively applied by state courts. The State's response to the order to show cause in this case does not contend otherwise.

To the extent the State suggests that Appellant’s federal arguments have been addressed in other cases, those decisions are not applicable here. As Appellant 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 Appellant this Court’s recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017), and *Hannon v. State*, No. SC17-1837, 2017 WL 4944899 (Fla. Nov. 1, 2017). There are real, unresolved issues here. Appellant urges this Court to address them.

II. The State’s cursory arguments concerning *Hurst* retroactivity are not persuasive

The State fails to engage substantively in Appellant’s argument that a retroactivity cutoff at *Ring* violates the Eighth Amendment’s prohibition against arbitrary and capricious imposition of the death penalty. *See* Appellant’s Resp. at 10-13. The State has therefore abandoned arguments on this issue. *Cf. Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011); *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002).

The State's failure to address the important Eighth Amendment problems with a *Ring*-based retroactivity cutoff is telling. As Appellant explained, 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 widely-recognized pragmatic necessity for courts to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments.

A *Hurst* retroactivity cutoff at *Ring* inaugurates a degree of capriciousness that far exceeds the level justified by “normal” jurisprudence. To see why this is so, one need only consider how Florida's pre-*Ring* inmates do and do not differ from their post-*Ring* peers. The two groups were both sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial. But inmates whose sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts and have demonstrated over a longer time that they are capable of adjusting to that environment without endangering any valid interest of the State. Pre-*Ring* inmates also have undergone the prolonged suffering chronicled by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts.

Pre-*Ring* inmates also are more likely than their post-*Ring* counterparts to have been sent to death row under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency prevailing today. In the generation since *Ring*, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of

cases which terminated in a death verdict before *Ring* are cases where a death sentence would not be imposed, or even pursued, in the modern era. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic 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. Evidence that led to confident convictions and unhesitating death sentences decades ago would have substantially less convincing power to prosecutors, juries, and judges today.

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

The cursory federal retroactivity arguments the State does advance can be dispensed with briefly. The State asserts, without any authority, that “[t]he only possible standard of review under equal protection principles would be rational basis review.” State’s Resp. at 13. This ignores *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), where the Court states that a law “which involves one of the basic rights of man” is subject to strict scrutiny. The State further claims that Appellant believes “all retroactivity tests violate equal protections.” State’s Resp. at 13 (emphasis added). At issue here is a retroactivity test that implicates Appellant’s *fundamental*

rights. A retroactivity cutoff that deprives some capital defendants of their fundamental right to a reliable determination of their sentences—while affording similarly-situated defendants the benefits of decision-making by a penalty-phase jury—violates the Fourteenth Amendment’s guarantee of equal protection.³

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 5. But as Appellant explained initially, *see* Appellant’s Resp. at 18, 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. Although 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*

³ The State contends, “it is doubtful that Equal Protection analysis even applies to judicial decisions,” citing *Bowie v. City of Columbia*, 378 U.S. 347 (1964). However, the Court in *Bowie* did not limit application of equal protections analyses to statutes. *Id.* (“We do not reach the question presented under the Equal Protection Clause, for we find merit . . . under the Due Process Clause.”).

State's Resp. at 11-12, those attempts fall flat. 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 *Hurst* decisions held that *the jury* must make the beyond-a-reasonable-doubt findings that subject a defendant to a death sentence. Indeed, a federal judge in Florida, citing *Ivan*, has already observed the distinction between the holding of *Summerlin* and the retroactivity of *Hurst* because of the beyond-a-reasonable-doubt standard. See *Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (contrasting *Hurst* to *Ring* and *Summerlin*, because the latter decisions "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

The State's citation to *Powell* in arguing against the federal retroactivity of *Hurst*, see State's Resp. at 11-12, is particularly odd considering that, in *Powell*, the Delaware Supreme Court applied a retroactivity test that mirrors the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and held that *Hurst* should be applied retroactively in Delaware. See *Powell*, 153 A.3d at 75-76. If anything, *Powell* favors Appellant's position.

Finally, the State mischaracterizes Appellant's arguments under *Montgomery*. Appellant correctly explained that *Montgomery* held that states are bound by the Supremacy Clause to apply constitutional rules retroactively when those rules are substantive within the meaning of federal law. See Appellant's Resp. at 12-19; *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.”). The *Hurst* decisions announced substantive rules; the Constitution requires this Court to apply them retroactively.

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

The State’s “harmless error” arguments rely entirely on the unconstitutional bright-line test, established in *Davis v. State*, 207 So. 3d 142, 176 (Fla. 2016), holding that *Hurst* errors are per se harmless in every unanimous-recommendation case. See State’s Resp. at 13 n.7. The State ignores Appellant’s arguments that this bright-line test is unconstitutional. See Appellant’s Resp. at 15-19.

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

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

Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme.”).

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, this reply brief was electronically served via the e-portal to Assistant Attorney General Charmaine M. Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Karin L. Moore
Karin L. Moore

EXHIBIT 7

DP DEATH PENALTY IC INFORMATION CENTER



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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

062a

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, Phillup 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.

EXHIBIT 8

1. *Alston v. State*, Nos. SC17-499, SC17-983, 2018 WL 494427 (Fla. Jan. 22, 2018)
2. *Bates v. State*, 238 So. 3d 98 (Fla. 2018)
3. *Bradley v. Jones*, 238 So. 3d 95 (Fla. 2018)
4. *Branch v. State*, 234 So. 3d 548 (Fla. 2018)
5. *Jones v. State*, 234 So. 3d 545 (Fla. 2018)
6. *Peterka v. State*, 237 So. 3d 903 (Fla. 2018)
7. *Phillips v. State*, 234 So. 3d 547 (Fla. 2018)
8. *Stephens v. State*, 238 So. 3d 94 (Fla. 2018)
9. *Suggs v. State*, 234 So. 3d 546 (Fla. 2018)
10. *Walls v. State*, 238 So. 3d 96 (Fla. 2018)
11. *Atwater v. State*, 234 So. 3d 550 (Fla. 2018)
12. *Beasley v. State*, 234 So. 3d 553 (Fla. 2018)
13. *Burns v. State*, 234 So. 3d 555 (Fla. 2018)
14. *Clark v. State*, 238 So. 3d 99 (Fla. 2018)
15. *Cole v. State*, 234 So. 3d 644 (Fla. 2018)
16. *Ford v. State*, 237 So. 3d 904 (Fla. 2018)
17. *Puiatti v. State*, 234 So. 3d 551 (Fla. 2018)
18. *Rhodes v. State*, 234 So. 3d 554 (Fla. 2018)
19. *Willacy v. State*, 238 So. 3d 100 (Fla. 2018)
20. *Windom v. State*, 234 So. 3d 556 (Fla. 2018)
21. *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018)
22. *Evans v. State*, No. SC17-869, 2018 WL 524796 (Fla. 2018)
23. *Jackson v. State*, 237 So. 3d 905 (Fla. 2018)

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

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

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

EXHIBIT 9

RECEIVED
JOHN KEENE

NCA: 4-27 95

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR CLAY COUNTY, FLORIDA.

CLERK OF COURTS
CLAY COUNTY, FL

CASE NO.: 94-537 CF

DIVISION: CR-B

STATE OF FLORIDA

VS.

FLOYD DAMREN

THIS INSTRUMENT IN THE COMPUTE

MAR 08 1995

JOHN KEENE
CLERK OF CIRCUIT COURT
CLAY COUNTY, FLORIDA

MOTION TO DISMISS AND TO DECLARE
SECTIONS 782.04 AND 921.141, FLORIDA STATUTES,
UNCONSTITUTIONAL FOR A VARIETY OF REASONS

Defendant, by and through the undersigned counsel, moves this Honorable Court to dismiss the Indictment filed in the above-styled cause and to declare Sections 782.04 and 921.141, Florida Statutes, unconstitutional.

As grounds for this Motion, the defendant states:

1. The Indictment does not properly charge a capital offense in that statutory aggravating circumstances the State will rely on in order to obtain the death penalty are not alleged in the Indictment, in violation of Article I, Sections 15 and 16, Florida Constitution, and the Fourteenth Amendment to the United States Constitution. Defendant has the fundamental constitutional right to notice of the charges against him including the aggravating circumstances to be considered by the jury in the second phase of the trial. Cole v. Arkansas, 333 U.S. 196 (1948). Cole held that it was unfair to convict a defendant of an offense which was not properly charged in the charging

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document. Presnell v. Georgia, 439 U.S. 14 (1978) held that the right to notice applies to the penalty phase of a capital case with equal force to its application to the guilt phase of any criminal trial.

2. Sections 782.04, 775.082, and 921.141, Florida Statutes, provide for the arbitrary infliction of punishment so as to deprive the defendant of life and liberty without Due Process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution.

3. The above-mentioned Sections are so vague, ambiguous and indefinite so as to deprive the defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide, and to be able to prepare a defense accordingly, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 16, of the Florida Constitution.

4. Section 921.141 places upon the defendant the burden of proving mitigating circumstances in violation of his rights against self-incrimination as provided in the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2 and 9, of the Florida Constitution.

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5. Section 921.141 does not require the State to prove beyond a reasonable doubt that the statutory aggravating factors in subsection (5) outweigh the mitigating circumstances listed in subsection (6) in each particular capital case. It thus violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9 of the Florida Constitution. The standard of proof beyond and to the exclusion of every reasonable doubt is fundamental to our legal system and applicable to state criminal prosecutions. In re Winship, 397 U.S. 358 (1970). In phase two of a capital trial, the jury is instructed to find the existence of an aggravating circumstance beyond a reasonable doubt. However, in the jury's ultimate decision as to whether to recommend a life or death sentence, the jury is instructed pursuant to Section 921.141(3), to recommend death unless the mitigating circumstances "outweigh" the aggravating circumstances. The instruction to the jury to weigh the aggravating and mitigating circumstances in arriving at their recommendation to the court gives the jury inadequate guidance. The defendant's right to the reasonable doubt standard applies equally to the ultimate determination of whether he lives or dies as to the determination of his guilt or innocence.

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6. Section 775.082, in requiring a defendant convicted of first degree murder to be sentenced to life imprisonment and requiring him to serve a mandatory sentence of twenty-five (25) years, is in violation of the Eighth Amendment and the Due Process and Equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution, in that no clear and reasonable guidelines exist for the implementation of the punishment in that the punishment bears no rational relationship whatsoever to the defendant's acts or background, and cannot be justified to serve any recognized penological purpose. The mandatory life sentence with no parole for a minimum period of 25 years violates the requirement of individual sentencing laid out in Woodson v. North Carolina, 428 U.S. 280 (1976), Lockett v. Ohio, 438 U.S. 586 (1978) and Gardner v. Florida, 430 U.S. 349 (1977).

7. Section 921.141, Florida Statutes, violates the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution in that the fundamental right to life is deprived by imposition of the death penalty without requiring the State to prove beyond a reasonable that there is a compelling State interest for imposition of the death sentence, and that the death

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sentence is the least restrictive means of achieving that State interest.

8. Section 921.141 provides for the method to be followed in the imposition of the death penalty which is procedural rather than substantive in nature. It thus violates the separation of powers between the law-making function of the legislature and the rule-making function of the judiciary, in violation of Article V, Section 2, Florida Constitution.

9. The Florida death penalty statute is unconstitutional as applied in that the Florida Supreme Court has the obligation to review death sentences and assure that they are being imposed in a uniform and reasonable fashion. However, the Florida Supreme Court opinions have been unconstitutionally inconsistent in dealing with the weighing of the aggravating and mitigating circumstances. The Florida Supreme Court has abrogated the third level of review under Florida's trifurcated death penalty statute and, therefore, the the death penalty statute is being applied unconstitutionally. See, Witt v. State, 342 So.2d 497 (Fla 1977). The Appellate Court decisions are inconsistent in their review and are unconstitutional as applied violating the review requirements of Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

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10. The Florida murder statutes, Section 782.02 and Section 921.141 are unconstitutional as applied in that Florida adheres to the felony murder doctrine which allows premeditation to be established through proof of an underlying felony. In the absence of adequate notice as to whether or not the defendant is called upon to defend against a felony murder or a premeditated murder, the statute is unconstitutional.

11. Section 921.141, Florida Statutes, is unconstitutional on its face as it allows for excessive and disproportionate penalties to be imposed upon persons who have not deliberately taken the life of another, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, concurring opinion of Justice White at 2981, (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, at 2932 (1976); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861 (1977); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

12. The Florida death penalty statute is unconstitutional on its face because it creates a presumption in favor of death for those convicted under the felony-murder rule. Under Section 921.141(5)(d), Florida Statutes, the perpetration of a homicide during the commission of a designated felony constitutes an aggravating circumstance. When one or more

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statutory aggravating circumstances are proved beyond a reasonable doubt, a presumption arises that death is the appropriate penalty by operation of a law. State v. Dixon, 283 So.2d 1, at 9, (Fla. 1973). Therefore, anyone convicted of first degree murder under the felony-murder doctrine is presumptively destined for death, regardless of his limited participation in the felony and lack of participation in the homicide. There is no such aggravating circumstance applicable in the case of every premeditated murder, since Section 921.141(5)(i), Florida Statutes, utilizes qualifying language to make only certain premeditated acts an aggravating circumstance. The statute, therefore, makes possible a disproportionality higher frequency of death sentences for those convicted of felony murder than those convicted of premeditated murder. There is no rational basis for this disproportionality in sentencing, since in felony-murder the liability can be for aiding and abetting a felony that resulted in death, while in a premeditated murder the defendant can be the actual perpetrator who intended death to result. The Florida death penalty statute therefore violates the defendant's right to equal protection and due process of law, and the right to be free from an arbitrary and capricious sentencing process, as guaranteed by Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States

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Constitution. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

13. The presumption in favor of death created by the establishment of only one single aggravating circumstance has the result of imposing upon the defendant the burden of establishing why he should live. This impermissible shift in the burden of proof and persuasion contravenes every fundamental principle underlying our system of criminal justice, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

14. Liability for first degree murder in Florida arises from evidence of a killing during the commission of an enumerated felony, or from evidence of a killing from a premeditated design. Section 921.141(5)(d), Florida Statutes, permits the fact that the murder occurred during the commission of the same enumerated felonies to be used as an aggravating circumstance in the penalty phase of the trial. This practice has the effect of twice penalizing the defendant for the same aspect of the crime, and at the penalty phase shifts the burden of proof to the defendant because the existence of an aggravating circumstance is automatic

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upon conviction. To punish a defendant in the penalty phase for the same element of the crime which was necessary to prove a conviction in the guilt phase is to violate the double jeopardy and collateral estoppel concepts of Article I, Section 9 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979).

15. Section 921.141, Florida Statutes, is unconstitutional on its face because a jury recommendation of life imprisonment need not be followed by the trial court judge. The standard to be applied by the judge in overruling a life recommendation is that "facts suggesting a sentence of death" are "so clear and convincing that no reasonable person could differ." Tedder v. State, 322 So.2d 908, at 910 (Fla. 1975). To sustain a death sentence in the face of a jury life recommendation necessarily requires a determination that the jury's recommendation is unreasonable. This standard is impossible to implement. As the Fifth Circuit Court of Appeals has said, "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978). Because reasonable persons can and virtually always do disagree over

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whether a particular defendant should be sentenced to death, the Tedder standard is not susceptible of rational application, and fosters the arbitrary, unreliable, and capricious imposition of capital punishment, in violation of Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

16. Section 921.141, Florida Statutes, is unconstitutional because it permits the trial judge to overrule a jury life recommendation, contrary to the clear expression of the conscience of the community. "Juries are the conscience of our communities."

McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). In determining whether punishment comports with the Eighth Amendment's ban against cruel and unusual punishments, an assessment of contemporary values or "evolving standards of decency" is required. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). A jury life recommendation reflects a determination that, in an individual case, imposition of the death penalty does not accord with contemporary values. To discard such a determination is to ignore the vital source from which the "cruel and unusual punishment" clause derives its meaning, in violation of Article I,

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Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

17. Since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), a majority of American jurisdictions have enacted capital punishment statutes that permit jury participation in sentencing. A majority of these jurisdictions have made a jury life verdict binding. A majority of these states having death penalty statutes make a life sentence automatic if even one juror refuses to vote for death. However, Section 921.141, Florida Statutes, only requires a majority recommendation from the jury and permits the judge to overrule it. The infliction of the death penalty contrary to a jury's verdict of life is repugnant to the representative scheme of checks and balances basic to our government system. As Justice Powell has observed:

One of the criticisms leveled against our system is the absence of a remedy for an unjustified acquittal by a jury...The founding fathers, in light of history, decided that the balance here should be struck in favor of the individual. To reverse this today would negate the key role of the jury as a popular check on government. It might even unbalance our entire system of constitutional checks and balances. Powell, "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, at 7-8, (1966).

The overruling of a jury life verdict therefore violates the concept of limited and representative government as embodied in

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the Ninth and Fourteenth Amendments to the United States Constitution.

18. Section 921.141, Florida Statutes, is unconstitutional on its face because the jury recommendation need not be unanimous, thereby depriving the defendant of the rights to due process and to a unanimous jury verdict, in violation of Article I, Sections 9, 16, and 22 of the Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

19. The death penalty in Florida is unconstitutional because upon conviction of the defendant the jury is not required to list the specific aggravating circumstances they have found beyond a reasonable doubt when they recommend the death penalty. In that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury found and what aggravating circumstances the jury did not find. This permits the trial judge when imposing sentence to consider and find aggravating circumstances that the jury did not. This results in disproportionate and unreliable imposition of the death penalty, in violation of Article I, Sections 9 and 17 of the Florida Constitution, Section 921.141, Florida Statutes, and holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v.

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State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla 1973). It also prevents the Florida Supreme Court from conducting a meaningful review of a particular case relative to other cases in which the death penalty has been imposed. See Dixon and Sullivan, supra.

20. Section 921.141, Florida Statutes, is unconstitutional because it permits the trial judge to consider aggravating circumstances in imposing the death sentence that the advisory jury may not have considered, or that the jury may have decided did not exist. Furthermore, Section 921.141, Florida Statutes, permits the trial judge to find that aggravating circumstances outweigh any mitigating circumstances despite a jury recommendation of life imprisonment. A jury recommendation of life instead of death necessarily involves a finding that (a) no aggravating circumstances exist, or (b) the aggravating circumstances do not outweigh any mitigating circumstances. The collateral estoppel concept of the prohibition against double jeopardy prevents the trial judge from reconsidering the issues of whether certain aggravating circumstances exist, or whether the aggravating circumstances outweigh any mitigating circumstances. Since Section 921.141, Florida Statutes, permits such factual findings to be twice litigated and twice decided, it violates the

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Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

21. The State of Florida is unable to justify the death penalty as the least restrictive means available to further its compelling goals where a fundamental right, human life, is involved, as required under Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973). Studies indicate that the death penalty is not an effective deterrent to crime and that there are other less drastic methods of punishment available which serve the same goals of the state. Since the death penalty serves no useful purpose, Section 921.141, Florida Statutes, violates the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution.

22. Although the Florida and United States Supreme Courts have upheld the constitutionality of Section 921.141, Florida Statutes, the death penalty has in fact been administered and applied in a manner which is inconsistent with the premises of these Courts' decisions. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that harsh punishments be fairly and evenhandedly imposed. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942). Studies have shown that the race of the victim is the paramount consideration in determining whether a defendant receives the

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death sentence. The sentencing decision patterns of juries and judges under Section 921.141, Florida Statutes, have exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Death sentences in Florida are imposed irregularly, unpredictably, and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing recommendations, uneven and inconsistent and arbitrary jury attitudes and sentencing recommendations, uneven and inconsistent prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellate review by the Florida Supreme Court all contribute to produce an unreliable, irregular and freakish pattern of life or death sentencing results. Therefore, as it has been and is being applied, Section 921.141, Florida Statutes, violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 17 of the Florida Constitution.

WHEREFORE, Defendant moves this Honorable Court to dismiss the Indictment filed in the above-styled cause and to