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APPENDIX

A

238 So.3d 96
Supreme Court of Florida.

Frank A. WALLS, Appellant,

v.

STATE of Florida, Appellee.

No. SC17-959

|

[January 22, 2018]

Synopsis

Background: Motion was filed for post-conviction relief from death penalty affirmed on appeal, 641 So.2d 381. The Circuit Court, Okaloosa County, William Francis Stone, J., No. 461987cf000856XXXAXX, denied motion. Movant appealed.

[Holding:] The Supreme Court held that Supreme Court's *Hurst v. Florida*, 136 S.Ct. 616, decision invalidating Florida's capital sentencing scheme did not apply retroactively to sentence of death that became final in 1995.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] Courts

➔ In general;retroactive or prospective operation

United States Supreme Court's *Hurst v. Florida*, 136 S.Ct. 616, decision invalidating Florida's capital sentencing scheme as violating Sixth Amendment did not apply retroactively to sentence of death that became final in 1995. U.S. Const. Amend. 6.

Cases that cite this headnote

*97 An Appeal from the Circuit Court in and for Okaloosa County, William Francis Stone, Judge—Case No. 461987CF000856XXXAXX

Attorneys and Law Firms

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

Opinion

PER CURIAM.

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

Walls' motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Walls' appeal pending the disposition of *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided *Hitchcock*, Walls responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing Walls' response to the order to show cause, as well as the State's arguments in reply, we conclude that Walls is not entitled to relief. Walls was sentenced to death following a jury's unanimous recommendation for death. *Walls v. State*, 641 So.2d 381, 386 (Fla. 1994). Walls' sentence of death became final in 1995. *Walls v. Florida*, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995). Thus, *Hurst* does not apply retroactively to Walls' sentence of death. See *Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Walls' motion.

The Court having carefully considered all arguments raised by Walls, 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, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

238 So.3d 96, 43 Fla. L. Weekly S23

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APPENDIX

B

IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS
Appellant,

v.

SC17-959

STATE OF FLORIDA
Appellee.

MOTION FOR REHEARING

Appellant Frank A. Walls, through counsel, respectfully moves for rehearing of this Court's Opinion of January 22, 2018, denying Mr. Walls's Successive Motion to Vacate his Sentence of Death. Mr. Walls respectfully submits that this Court overlooked and misapprehended points of law and fact, and specifically neglected to review Mr. Walls's substantial non-*Hurst* federal constitutional claims. No claim previously raised is hereby abandoned.

The Opinion denying Mr. Walls relief was one of the first of 80 virtually identical Opinions that have been released by this Court, in groups of 10, starting on Monday, January 22, 2018. See <http://www.floridasupremecourt.org/decisions/opinions.shtml> (last visited February 2, 2018). There was no individual analysis conducted in Mr. Walls's case. Instead, this Court just issued a boilerplate two-page, four-paragraph

Opinion stating what his jury recommendation was and the fact that his case was final in 1995. (Opinion, p. 2).

However, the Court specifically failed to address his non-*Hurst* claim that his death sentence was obtained in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In at least six other cases in an identical posture before this Court, the Court has allowed for additional briefing on “non-*Hurst* related issues.” *See e.g. Spencer v. State*, SC17-1269. At the very least, Mr. Walls should be entitled to full briefing on his *Caldwell* claim.

In all death penalty cases, this Court, both because of the Eighth Amendment and because of the special role assigned to it by the laws and Constitution of Florida, is “required to conduct a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.” *Davis v. State*, 207 So. 3d 142, 172 (Fla. 2016)(internal quotations and citations omitted). Even if by issuing 80 identical opinions denying relief, without any individual analysis, this Court had not violated its duty to ensure that Florida’s death penalty is uniformly and fairly administered, by allowing for additional briefing of “non-*Hurst* related issues” in some cases but not this one– notwithstanding the explicit request made herein (*see* Response on Order to Show cause, p. 1-2 and Response to State’s Reply, p. 1-2) - this Court has been arbitrary in its evaluation of Florida’s death

penalty cases. Such disparate treatment is a violation of due process and equal protection under the law. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Further, this Court is obligated to meaningfully address Walls's federal arguments because state courts have a duty to adjudicate claims pressed upon them under federal law. See *Howlett v. Rose*, 496 U.S. 356, 367-72 (1990) (unanimously reversing Florida court). In fact, to the extent this Court arbitrarily narrows Mr. Walls's rights under state law to have his federal constitutional claims fully heard on appeal, it is committing an independent violation of his due process rights. See, e. g., *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 456 -458 (1958).

This Court undoubtedly plays a critical role in ensuring that the death penalty in Florida is administered in a fundamentally fair and balanced way. Mr. Walls asserts that the issuance of an individualized opinion detailing the Court's findings, as to the specific facts and issues raised by Mr. Walls, is necessary to fulfill that important role, and to ensure that no citizen is executed without having his claims comprehensively analyzed. Failure to do so will "push Florida's death penalty jurisprudence into an unconstitutional abyss." *State v. Slivia*, SC17-337, p. 5 (Lewis, J., dissenting).

Mr. Walls respectfully requests this Court allow additional and full briefing on his *Caldwell* claim, or, in the alternative, grant Rehearing and conduct an

individual and specific analysis of his *Caldwell* claim that was preserved and briefed before this Court.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Charmaine Millsaps, Asst. Attorney General, charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, on this 5th day of February, 2018.

/s/ Maria E. DeLiberato

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Supreme Court of Florida

THURSDAY, FEBRUARY 22, 2018

CASE NO.: SC17-959

Lower Tribunal No(s).:
461987CF000856XXXAXX

FRANK A. WALLS

vs. STATE OF FLORIDA

Appellant(s)

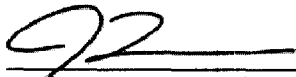
Appellee(s)

Appellant's Motion for Rehearing is hereby stricken.

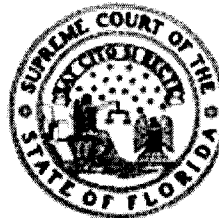
LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



jat

Served:

MARIA E. DELIBERATO
CHARMAINE M. MILLSAPS
CHELSEA RAE SHIRLEY
JULISSA FONTÁN
HON. WILLIAM FRANCIS STONE, JUDGE
HON. J.D. PEACOCK, II, CLERK
JOHN A. MOLCHAN

APPENDIX

C

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 87-CF-856

Div. 002

FRANK A. WALLS,

Defendant.

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CAUSE is before the Court pursuant to Defendant's "Successive Motion to Vacate Death Sentence," filed on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851, in which Defendant seeks relief based on Hurst v. Florida, 136 S. Ct. 616 (2016) and its progeny. The State filed an answer to the motion on January 19, 2017. On February 13, 2017, the Court conducted a case management conference, at which the Court heard arguments from the State and defense counsel regarding the motion.¹ On that day, defense counsel filed affidavits from Defendant's trial counsel to support the defense argument for an evidentiary hearing on the motion. The State filed a response to the affidavits and arguments concerning an evidentiary hearing. Having reviewed the motion, answer, affidavits, response, record, applicable law, and having considered the arguments presented at the case management conference, the Court finds as follows:

¹ The case management conference was also conducted on Defendant's intellectual disability claim, which was not brought in the present motion. That matter remains pending at the time of the entry of this Order. See footnote 4, *infra*.

Background

Following a retrial, Defendant was found guilty of first-degree murder, and the jury unanimously recommended a sentence of death. On July 29, 1992, Defendant was sentenced to death. The Florida Supreme Court affirmed the judgment and sentence on July 7, 1994.² The United States Supreme Court denied certiorari on January 23, 1995.³ Defendant filed an initial motion for postconviction relief, the denial of which was affirmed by the Florida Supreme Court on February 9, 2006.⁴

The Present Successive Motion

Defendant raises three claims in his motion, all of which rely on Hurst v. Florida, 136 S. Ct. 616 (2016) and its progeny. Defendant alleges that (1) he is entitled to retroactive application of Hurst, and the State cannot establish that the Hurst error was harmless beyond a reasonable doubt; (2) his death sentence violates the Eighth Amendment under Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016); and (3) due to the new requirement of unanimity in capital sentencing proceedings as announced in Hurst, his prior postconviction claims must be reheard.

² Walls v. State, 641 So. 2d 381, 391 (Fla. 1994).

³ Walls v. Florida, 513 U.S. 1130 (1995).

⁴ Walls v. State, 926 So. 2d 1156 (Fla. 2006). Although this Court's order was affirmed, the Florida Supreme Court concluded that Defendant was entitled to file a motion for determination of intellectual disability pursuant to rule 3.203. Id. at 1181. Subsequently, Defendant filed a motion in which he raised the issue of whether he was ineligible for the death penalty pursuant to rule 3.203. Following an evidentiary hearing on the matter, the Court entered an order denying relief, which the Florida Supreme Court affirmed on October 31, 2008. Walls v. State, 3 So. 3d 1248 (Fla. 2008) (unpublished table disposition). On May 26, 2015, Defendant filed a successive postconviction motion in which Defendant sought an opportunity to present additional evidence concerning intellectual disability based on Hall v. Florida, 134 S. Ct. 1986 (2014). On July 10, 2015, this Court entered an order denying the motion. The Supreme Court of Florida reversed and remanded to this Court to conduct an evidentiary hearing. Walls v. State, SC15-1449, 2016 WL 6137287 (Fla. 2016). That matter remains pending at the time of the entry of this Order.

Legal Authority

In Hurst v. Florida, the Supreme Court of the United States held that Florida's capital sentencing scheme violated the Sixth Amendment in light of Ring v. Arizona, 536 U.S. 584 (2002) because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."⁵ Subsequently, in Hurst v. State, the Supreme Court of Florida held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."⁶ Hurst relief applies retroactively to cases in which the sentence of death was not final at the time Ring was issued, which was in 2002.⁷ In Asay v. State, the Florida Supreme Court decided that Hurst *does not* apply retroactively to sentences that were final before Ring was decided.⁸

Analysis

Defendant's judgment and sentence became final in 1995 when the United States Supreme Court denied certiorari.⁹ This Court is constrained to follow the decision of the Supreme Court of Florida that defendants whose sentences became final before Ring issued in 2002 are not entitled to retroactive application of Hurst. Consequently, Defendant, whose

⁵ Hurst v. Florida, 136 S. Ct. 616, 621 (2016).

⁶ Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016).

⁷ Mosley v. State, SC14-2108, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016); Hojan v. State, SC13-2422, 2017 WL 410215, at *12 (Fla. Jan. 31, 2017) ("In Mosley, we determined that Hurst v. Florida and Hurst apply retroactively to defendants, like Hojan, whose sentences were not yet final when the Supreme Court issued Ring.").

⁸ Asay v. State, SC16-102, 2016 WL 7406538, at *4 (Fla. Dec. 22, 2016).

⁹ See Fla. R. Crim. P. 3.851(d)(1).

sentence became final prior to the issuance of Ring, is not entitled to relief because each of his claims hinges upon a retroactive application of Hurst.¹⁰

Therefore, it is **ORDERED and ADJUDGED** that Defendant's "Successive Motion to Vacate Death Sentence" is **DENIED**.

Defendant has the right to appeal within 30 days of the rendition of this Order.

DONE AND ORDERED in Fort Walton Beach, Okaloosa County, Florida.



eSigned by CIRCUIT COURT JUDGE WILLIAM STONE in 01 JUDGE STONE
on 02/20/2017 15:22:01 Q.-L16qa

WFS/ceb

Copies of the foregoing Order to be served by the Clerk of the Court on the following:

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Frank A. Walls, DC# 112850, Union Correctional Institution, 7819 N.W. 228th Street,
Raiford, Florida 32026-4000*

¹⁰ Asay v. State, SC16-102, 2016 WL 7406538 (Fla. Dec. 22, 2016); see Gaskin v. State, SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19, 2017) ("Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida."); Bogle v. State, SC11-2403, 2017 WL 526507, at *16 (Fla. Feb. 9, 2017) ("Hurst does not apply retroactively to cases that were final before Ring was decided.").

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA

CASE #(S) 1987 CF 000856 A

-VS-

WALLS, FRANK ATHEN

CERTIFICATE OF SERVICE

Pursuant to FRCP 3.851(5)(F), this is to certify that a copy of the preceding order in the above styled cause to the following:

Office of the State Attorney, via electronic mail.

- John Molchan – jmolchan@sa01.org
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By US mail to:

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Union Correctional Institution

7819 N.W. 228th Street

Raiford, FL 32026-4000

Dated this 22 day of February, 20 17.

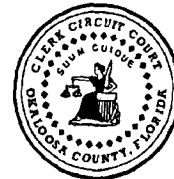
JD Peacock II

Clerk of Circuit Court and Comptroller

Janishia Childres

By:

Deputy Clerk



APPENDIX

D

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case No.: 87-CF-856

Div. 002

v.

FRANK A. WALLS,

Defendant.

_____ /

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

Defendant Frank A. Walls, by and through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of a change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, --- So.3d --- 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla. December 22, 2016) and *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016).

1. The judgment and sentence under attack and the name of the court that rendered the same.

The Circuit Court of the First Judicial Circuit, Okaloosa County, entered the judgments of conviction and sentence under consideration. Mr. Walls was convicted of the felony murders of Edward Alger and Ann Peterson in 1987. The jury recommended life for the murder of Alger and death for the murder of Peterson by a vote of 7-5. The Florida Supreme Court vacated those convictions and sentences and remanded for a new trial. *Walls v. State*, 580 So.2d 131 (Fla. 1991). Walls was convicted again after a retrial, and the jury again recommended death for the murder of

Peterson.¹ The convictions and sentence were affirmed on direct appeal. *Walls v. State*, 641 So.2d 381 (Fla. 1994)(cert denied)(*Walls v. Florida*, 513 U.S. 1130)(1995)

Mr. Walls filed a Motion to Vacate Judgments of Conviction and Sentence in 1997, which was amended in 2001. An evidentiary hearing was held on some claims in 2003. The circuit court denied relief and that denial was affirmed by the Florida Supreme Court. *Walls v. State*, 926 So.2d 1156 (Fla. 2006).

In May of 2006, Mr. Walls filed a federal petition for writ of habeas corpus, which was denied. *Walls v. McNeil*, 2009 WL 3187066 (N.D. Fla. 2009). The District Court granted a COA, and the Eleventh Circuit denied relief on September 28, 2011. *Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011)(cert denied)(*Walls v. Tucker*, 132 S.Ct. 2121 (2012)).

While the federal habeas proceedings were pending, Mr. Walls filed a motion to bar his execution due to intellectual disability pursuant to Fl. R. Crim. Pro. 3.203. After an evidentiary hearing, this Court denied relief. The Florida Supreme Court affirmed the denial of relief. *Walls v. State*, 3 So.3d 1248 (Table)(Fla. 2008). The sole basis for the decision was that “[t]here is no evidence that Walls has ever had an IQ of 70 or below.” *Id.* (citing *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)). After the United States Supreme Court rejected Florida’s rigid 70 IQ cutoff score in *Hall v. Florida*, 134 S.Ct. 1986 (2014), Mr. Walls filed a successive post-conviction motion alleging that he was entitled to a new evidentiary hearing under the *Hall* guidelines. This Court summarily denied the Motion. On appeal, the Florida Supreme Court reversed, finding that *Hall* applied retroactively and that Mr. Walls was entitled to a new evidentiary hearing to establish that his intellectual disability bars his execution. *Walls v. State*, --- So. 3d --- 2016 WL 6137287 (Fla.

¹ Double Jeopardy precluded the State from seeking death again on the murder of Alger. The jury recommendation in the retrial was unanimous, although there was no special verdict form or any indication of what aggravators or mitigators the jury found.

October 20, 2016). The Court denied both Mr. Walls' and the State's Motion for Rehearing on January 9, 2016. This Court scheduled a status hearing for February 13, 2016.

Mr. Walls seeks an order of this Court vacating his death sentence, which was imposed only after an advisory jury recommendation.

2. Issues raised on appeal and disposition thereof.

The following issues were raised in Mr. Walls direct appeal²:

1. The trial court should have excused a potential juror for cause or granted the defense an additional peremptory challenge to excuse the juror. (Denied)
 2. The State improperly exercised peremptory challenges to dismiss two black jurors based on their race. (Denied)
 3. The jurors were kept in session for overtaxing hours during trial. (Denied)
 4. The trial court gave the jury erroneous penalty phase instructions on the mitigating factors of mental disturbance, impairment, or duress and on the aggravating factors of HAC and CCP. (HAC and mitigation instructions were proper, but the CCP instruction was error. However, the error as to the CCP instruction was harmless)
 5. The trial court refused to provide the jury with a detailed interpretation of emotional disturbance as a mitigating factor. (Denied)
 6. The trial court made errors in its findings on the aggravating factors because HAC and CCP were not proven beyond a reasonable doubt, the evidence did not support the conclusion that the murder occurred during a kidnapping, the commission during a burglary impermissibly doubled the pecuniary gain factor, and the avoid arrest aggravator was improper. (Denied)
 7. The trial court required Walls to prove the mitigating factors by a preponderance of the evidence. (Denied).
 8. The trial court improperly rejected expert testimony that Walls was suffering from extreme emotional disturbance and substantial impairment. (Denied)
 9. The death sentence was disproportionate. (Denied)
- 3. Disposition of all previous claims raised in post-conviction proceedings and the reasons the claims raised in the present motion were not raised in the former motions.**

A. Initial 3.851 Motion and Appeal from Denial:

1. Walls was denied a fair guilt phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error. (Denied)
2. Counsel conceded guilt and eligibility for the death penalty without Walls' consent.
3. Walls was denied a fair penalty phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error. (Denied)

² These are the issues raised in the direct appeal from the retrial, as Mr. Walls was granted an entirely new trial after his first direct appeal.

4. Counsel failed to obtain an adequate mental health evaluation in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985). (Denied)
5. Walls' death sentence is unconstitutional because he is mentally retarded. (Denied without prejudice to file a 3.203 Motion).

B. State Petition for Habeas Corpus:

1. Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). (Denied – relying on *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005), the Court held that *Ring* was not retroactive under *Witt* and even if it was, Walls had a contemporaneous felony conviction).³
2. Walls' death sentence is invalid under *Ring* because the aggravating circumstances were not raised in the indictment. (Denied).
3. Appellate counsel was ineffective for failing to raise a number of claims on direct appeal. (Denied).

C. Intellectual Disability Proceedings

1. In 2007, Walls filed a motion pursuant to Rule 3.203 that his intellectual disability bars his execution. After an evidentiary hearing, that motion was denied. The Florida Supreme Court affirmed, on the sole basis that Walls failed to prove that he had an IQ score at 70 or below. *Walls v. State*, 3 So.3d 1248 (Table)(Fla. 2008).
2. In 2015, Walls filed a Successive 3.851 Motion alleging that *Hall v. Florida* entitled him to a new evidentiary hearing and determination of his intellectual disability claim. This Court summarily denied the Motion. The Florida Supreme Court reversed this Court's decision on appeal, and remanded for an evidentiary hearing. *Walls v. State*, --- So.3d ---, 2016 WL 6137287 (Fla. October 20, 2016). Motions for Rehearing remain pending.

D. Reason claims not raised in previous motions:

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies.

On October 14, 2016, the Florida Supreme Court issued its decision in *Perry v. State*, --- So. 3d---, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in

³ The Court has since overruled their holding in *Johnson* in *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla. December 22, 2016).

Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed. As the Florida Supreme Court explained in *Hurst*, “Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to ‘the evolving standards of decency that mark the progress of a maturing society,’ which inform Eighth Amendment analyses”. *Hurst v. State*, 202 So.3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that each aggravator exists, sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that were present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, ---So. 3d ---, 2016WL 6036982 *8, quoting *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) (“the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.”) See also *Hurst v. State*, 202 So.3d at 62, n. 18.

On December 22, 2016, the Florida Supreme Court decided that, as a matter of state law, there are two classes of defendants who are entitled to the retroactive application of *Hurst*:

1) Those whose sentences became final after the Supreme Court issued its decision in *Ring*. Such defendants are entitled to retroactive application as a group, regardless of preservation. See *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla., Dec. 22, 2016) at **56-

75. Because his direct appeal proceedings concluded in 1995, see *Walls v. Florida*, 513 U.S. 1130 (1995) (denying certiorari), Mr. Walls is outside this group.

2) Those who specifically preserved the *Ring* issue. See *Mosely* at *53-56 & n.13 (citing *James v. State*, 615 So. 2d 668 (Fla. 1993)). Considerations of fundamental fairness dictate the application of the requirements contained in *Hurst v. Florida* to this class of defendant. Mr. Walls is within this class. Because Mr. Walls “raised a *Ring* claim at his first opportunity and was then rejected at every turn ... fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*,” to him. *Mosley* at *56.

On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, Mr. Walls files this motion to vacate and presents his claims for relief arising from the resulting new Florida law, which was previously unavailable when Mr. Walls filed his prior motions.

4. The nature of the relief sought.

Mr. Walls seeks to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence.

5. Claims for which an evidentiary hearing is sought.

CLAIM I
MR. WALLS’ DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH
AMENDMENT UNDER *HURST V. FLORIDA* and *HURST V. STATE*.

This claim is evidence by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant’s previous motions to vacate, and all evidence presented by him during the previously conducted evidentiary hearings on the previously presented motions to vacate are incorporated herein by specific reference.

2. This motion is filed within one year of the issuance of *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, all of which established new Florida law. Accordingly, this motion is timely.

3. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment" It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who has been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

A. Mr. Walls is entitled to retroactive application of both *Hurst* decisions under the fundamental fairness doctrine.

4. The *Hurst* decisions apply retroactively to Mr. Walls under the equitable "fundamental

fairness” retroactivity doctrine, which the Court has applied in cases such as *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). In *Mosley*, the Court explained that although *Witt* is the “standard” retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which had been applied in cases like *James*. See *Mosley*, 2016 WL 7406506, at *19. The Court’s fundamental fairness analysis in *Mosley* made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* at *18-19. Rather, the *Mosley* Court’s separate fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida’s unconstitutional capital sentencing scheme and was “rejected at every turn” under this Court’s flawed pre-*Hurst* law. *Mosley*, 2016 WL 7406506, at *19.

5. Although *Mosley* was a post-*Ring* case, the Court’s fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. See *id.* at *19 n. 13. In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness, as measured by this Court on a case-by-case basis.

6. In assessing fundamental fairness in the retroactivity context, the *Mosley* 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. State* were decided. See *id.* at *19. If Mosley had raised such a challenge, the 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 sentence scheme even before they were recognized in the *Hurst* decisions. *See id.* The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed the State's interests in the finality of death sentences.

7. In Mr. Walls' case the *Hurst* decisions should apply retroactively under the fundamental fairness doctrine. He raised challenges on direct appeal challenging the jury instructions for various aggravators. Without the benefit *Hurst* decision, Mr. Walls raised a challenge to Florida's capital sentencing scheme during post-conviction. These efforts constituted a pre-*Ring* and pre-*Hurst* effort to raise *Ring*-like challenges, as well as a specific *Ring* challenge at his first opportunity, in his State Habeas Petition.

8. In this case, the interests of finality must yield to fundamental fairness. Mr. Walls, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst v. Florida* and *Hurst v. State*, should not be denied the chance to now seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Mr. Walls "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 2016 WL 7406506, at *25. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the *Hurst* decisions in this case.

B. Mr. Walls is entitled to retroactive application of both *Hurst* decisions under the traditional *Witt* test.

9. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v.*

State, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.⁴ Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute “a development of fundamental significance.” *Id.* *Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that provides for judges, not juries, to make the factual findings that are statutorily required to authorize the imposition of a death sentence.

10. The third factor under *Witt* is also met because *Hurst v. Florida* “constitutes a development of fundamental significance,” i.e., it is a change in the law which is “of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court’s decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).” *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted).⁵

⁴ Mr. Walls recognizes that *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst* under a *Witt* analysis, but that case left open the possibility for retroactivity under fundamental fairness. Rehearing has been filed and *Asay* is not final. In addition, Mr. Walls’ case should be decided on an individual basis. Moreover, the United States and Florida Constitutions cannot tolerate the concept of “partial retroactivity,” where similarly situated defendants are granted or denied the benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. To deny Walls the retroactive effect of *Hurst* deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

⁵ As applied to Mr. Walls, the first *Stovall/Linkletter* factor – the purpose to be served by the new rule – weighs heavily in favor of retroactivity. The right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 2016 WL 7406538, at *10 (“[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life”). The second *Stovall/Linkletter* factor – extent of reliance on the old rule – also weighs in favor of applying those decisions retroactively. This factor requires examination of the “extent to which a condemned practice

11. Retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925.

12. Anything less than full retroactivity leads to disparate treatment among Florida capital defendants. See *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (new penalty phases on 1974 murders); *State v. Dougan*, 202 So.3d 363 (Fla. 2016)(granting a new trial in a 1974 homicide); *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)(granting a new trial in a 1985 homicide); *Cardona v. State*, 185 So.3d 514 (Fla. 2016)(granting a new trial in a 1990 homicide), and *Johnson v. State*, ---So.3d --- 2016 WL 7013856 (Fla. December 1, 2016)(on a direct appeal from a resentencing, the Court remand for a new penalty phase because of *Hurst* error in a 1981 triple homicide).

13. Ensuring uniformity and fairness in circumstances in Florida's application of the death

infect(ed) the integrity of the truth-determining process at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Florida's unconstitutional sentencing scheme has always been unconstitutional and systemically infected the truth-determining process at penalty-phase proceedings since the statute was enacted – including Mr. Walls' trial. Accordingly, the second factor weighs in favor of retroactivity. Finally, the third *Stovall/Linkletter* factor – effect on administration of justice – also weighs in favor of retroactivity. This factor does not weigh against retroactivity unless, "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt v. State*, 387 So. 2d 922, 929–30 (Fla. 1980). There can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants will "destroy" the judiciary. Undoubtedly, retroactive application will have slightly more of an impact on the administration of justice but that is not the test. Retroactive application of new rules affecting much larger populations have been approved. See e.g. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

penalty requires the retroactive application of *Hurst* and the resulting new Florida law. After all, “death is a different kind of punishment from any other that may be imposed in this country,” and “[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

C. Mr. Walls has a federal right to retroactive application of the *Hurst* decisions.

14. Walls is also entitled to the retroactive effect of *Hurst* under federal law. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (“Where 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.”).

15. In *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. *First*, the Florida Supreme Court held that the Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. *Second*, the Florida Supreme Court held that the Eighth Amendment required that a jury unanimously determine that the evidence presented at the penalty phase warrants a death sentence.

16. *Hurst v. State* held that the “specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.” Such findings are manifestly substantive.⁶ See *Montgomery v.*

⁶In contrast, in *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989)—the basis of *Hurst v. Florida*—was not retroactive on federal collateral review. The rationale of *Summerlin* was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Louisiana, 136 S.Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person “whose crimes reflect the transient immaturity of youth” is substantive, not procedural).

17. Because the Sixth and Eighth Amendment rules announced in *Hurst v. State* are substantive, Mr. Walls is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

D. The State cannot establish that the Hurst error in Mr. Walls’ sentencing was harmless beyond a reasonable doubt.

18. The procedure employed when Mr. Walls received his death sentence deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury’s verdict authorizing a death sentence to be unanimous or else a life sentence is required, rather than a judge imposed sentence. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So.3d at 57-58. Individual jurors may decide to exercise “mercy” and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at*8.

19. At his initial penalty phase, jurors voted for life imprisonment for the murder of Alger, and

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama*—a case where the certiorari petition had not made a *Hurst* or *Ring* argument—the Supreme Court granted a *Hurst*-based petition for rehearing, vacated the state court’s judgment, and remanded to the state court for further consideration in light of *Hurst*. See No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016). The Supreme Court then followed this approach in three additional cases. See *Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016); *Kirksey v. Alabama*, No. 15-7923, 2016 WL 378578 (U.S. June 6, 2016); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016).

Last month, in *Powell v. Delaware*, the Delaware Supreme Court held that its recent decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), which invalidated Delaware’s death penalty scheme under *Hurst*, applied retroactively under that state’s retroactivity doctrine. See --- A.3d ---, 2016 WL 7243546 (Del. Dec. 15, 2016). As the *Powell* Court noted, *Schriro* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof.” 2016 WL 7243546, at *3.

7-5 for death for the murder of Peterson. At his resentencing, the jury was unanimous as to the murder of Peterson. Even though his second jury voted unanimously, the jury did not return a verdict making any findings of fact. The only document returned by the jury was an advisory recommendation that death should be imposed. Although the recommendation was unanimous, it reflects nothing about the jury's findings leading to the final vote. A unanimous recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It could also mean that the vote on the aggravators was split 6-6, and that there was no unanimous finding on a single aggravator. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were repeatedly told their verdict was only advisory, and that the judge would make the final determination. *See* ROA Vol. 7, p. 1115-1120.

20. In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." 202 So. 3d at 68. "[T]he harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (internal citations and quotation marks omitted). The State must show beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Mr. Walls by voting for a life sentence. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error was harmless in Mr. Walls' case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-

size fits all analysis; rather there must be a “detailed explanation based on the record” supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

21. As the Florida Supreme Court pointed out in *Hurst v. State*, “[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.” 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating “an advisory recommendation by the jury as the necessary factfinding”), as making findings the Sixth Amendment requires a jury to make. Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join a death recommendation at a resentencing. Equally important is any failure by sentencing counsel to properly present mitigating evidence to the jury because of Florida law that the jury vote was merely an advisory recommendation and the judge was the actual sentencer and fact finder. A hearing is warranted to evaluate the effect of the statute invalidated by *Hurst* on counsel’s development of challenges to aggravation, mitigation, and defense penalty-phase theories at sentencing.

22. As will be discussed further below, Mr. Walls’ jury was repeatedly told its recommendation was advisory only. In order to treat a jury’s advisory recommendation (especially one returned in 2 hours during a lunch break), the jury must be correctly instructed as to its sentencing

responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Post-*Hurst*, the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State*. Mr. Walls' jury was told the exact opposite – that Mr. Walls could be sentenced to death regardless of the jury's recommendation, thus relieving jurors of individual responsibility. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341. Mr. Walls' death sentence likewise violates the Eighth Amendment under *Caldwell*.

23. Moreover, Mr. Walls' jurors were not told they could exercise mercy by not joining a death recommendation irrespective of their views on the aggravation and mitigation. This distinguishes Mr. Walls' case from *Davis v. State*, ---So.3d--- 2016 WL 6649941 at *29 (Fla. Nov. 10, 2016), where the Court placed great emphasis on the fact that Davis' jury was instructed that "it was not required to recommend death even if the aggravators outweighed the mitigators" and that it nonetheless returned unanimous death recommendations. *Id.* The State cannot establish beyond a reasonable doubt that at least one properly instructed juror would have voted to dispense mercy.

24. When considering harmless error, this Court must look at the totality of the evidence, both at trial and in post-conviction. Substantial mitigation was not presented to Mr. Walls' jury, including significant evidence that he is intellectually disabled. Even if that pending issue is ultimately resolved against Mr. Walls, this Court cannot discount the effect that mitigation would have had on a single juror. Moreover, at his original proceeding, 5 jurors voted for life.

25. The error in Mr. Walls' case warrants relief. The State simply cannot show the error to be

harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Mr. Walls' death sentence must be vacated.

CLAIM II
MR. WALLS' DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH
AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED.

This claim is evidenced by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the two previously conducted evidentiary hearings on the previously presented motions to vacate are incorporated herein by specific reference.

2. In *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to allow jurors in capital cases to "exercise reasoned judgment in his or her vote as to a recommended sentence." *Hurst*, 202 So. 3d at 58.⁷ Accord *Perry*, 2016 WL 6036982 at *7-8 ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the

⁷ The U.S. Supreme Court as far back as 1974 held that a capital sentence can constitutionally dispense mercy in a case that otherwise might warrant imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 203 (1976). In Florida prior to *Hurst*, it was the sentencing judge who had been given the authority to dispense mercy in a capital case. However, that authority has now been transferred to the jury under *Hurst v. State*.

mitigating circumstances”). *See also Hurst*, 202 So. 3d at 58 (“Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death”).

3. The Florida Supreme Court further held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”).

4. But of course, the jury must know and appreciate the significance of its verdict:

In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

5. In *Caldwell*, the prosecutor’s argument improperly diminished the jury’s sense of responsibility. As such, the Supreme Court held that **the jury’s unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated.⁸ *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the

⁸ In her concurrence, Justice O’Connor wrote: “In telling the jurors, ‘your decision is not the final decision...[y]our job is reviewable,’ the prosecutor sought to minimize the sentencing jury’s role, by creating the mistaken impression that automatic appellate review of the jury’s sentence would provide the authoritative determination of whether death was appropriate.” *Caldwell*, 472 U.S. at 342-43.

sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). *Caldwell* explained: “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts. This desire makes the jury very receptive to the prosecutor’s assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Id.* at 331.⁹

6. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in “the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court.”). Where the jurors’ sense of responsibility for a death sentence is not explained or is diminished, a jury’s unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

7. The United States Supreme Court in *Caldwell* found that diminishing an individual juror’s sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are

⁹ This would certainly apply to the circumstances in Mr. Walls’ case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.”).

8. Mr. Walls’ jury was not advised of each jurors’ authority to dispense mercy. The circumstances under which Mr. Walls’ jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. “Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts. This desire might make the jury very receptive to the prosecutor’s assurance that it can more freely ‘err because the error may be corrected on appeal.’” *Caldwell*, 472 U.S. at 331. The advisory recommendation simply “does not meet the standard of reliability that the Eighth Amendment requires.” *Id.* at 341.

9. This Court cannot rely on the jury’s death recommendation in Mr. Walls’ case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury’s death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 (“The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant’s death.”). In Mr. Walls’ case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions.

10. In *Hurst v. Florida*, the US Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

“[T]he jury's function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) (“Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.”).

11. Additionally, under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida Supreme Court's Eighth Amendment ruling in *Hurst v. State* must be applied retroactively. Under *Witt v. State* and the fundamental fairness doctrine, the Florida Supreme Court's decision in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme.¹⁰

12. The Florida Supreme Court's recent decision in Mr. Walls case, *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), also indicates that *Hurst v. State* must be applied retroactively. Although *Walls* addressed the retroactivity of another Supreme Court decision involving an Eighth Amendment violation under *Hall v. Florida*, 134 S. Ct. 1986 (2014), it is instructive here. There,

¹⁰ “[R]etroactivity is binary – either something is retroactive, has effect on the past, or it is not.” *Asay*, 2016 WL 7406538, at *27 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery*, the Delaware Supreme Court's recent decision in *Powell v. Delaware*, 2016 WL 7243546 (Del. Dec. 15, 2016)(holding *Hurst* retroactive to all prisoners), and the Florida Supreme Court's decision in *Falcon*. If “partial retroactivity” ultimately occurs, Florida will again be the outlier, subjecting its citizens to disparate treatment under the law, in violation of the state and federal constitutions.

the Court concluded that the Eighth Amendment decision in *Hall* “removes from the State [the] authority to impose death sentences” in a category of cases. *Walls*, 2016 WL 6137287 at *5. “[Mr. Walls] eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence.” *Id.* at *8 (Pariente, J., concurring). “More than fundamental fairness and a clear manifest injustice, **the risk of executing a person who is not constitutionally able to be executed**, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied.” *Id.* (emphasis added).

13. Failing to apply *Hurst* retroactively to Mr. Walls, especially where he raised a *Ring* claim at his first opportunity, would be a violation of his due process and equal protection rights under the federal constitution and would result in a death sentence that is arbitrary and capricious in violation of the Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution.

14. Finally, Mr. Walls’ death sentence should be vacated because it was obtained in violation of the Florida Constitution. The increase in penalty imposed on Mr. Walls was without any jury at all. No unanimous jury found “all aggravating factors to be considered,” “sufficient aggravating factors exist[ed] for the imposition of the death penalty,” or that “the aggravating factors outweigh the mitigating circumstances.” There was only “unanimity in the final jury recommendation for death.” This was a further violation of Florida Constitution.

15. Mr. Walls had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Walls’ death sentences based on the Florida Constitution. Article I, Section 15(a) and Article I, Section 16(a).

16. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). Because the State proceeded against Mr. Walls under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Walls. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Walls was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Walls was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment. This Court should vacate Mr. Walls's death sentence.

CLAIM III
THIS COURT'S DENIAL OF MR. WALLS' PRIOR POSTCONVICTION
CLAIMS MUST BE REHEARD AND DETERMINED UNDER A
CONSTITUTIONAL FRAMEWORK.

This claim is evidence by the following:

1. All other factual allegations contained in this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the two previously conducted evidentiary hearings on the previously presented motions to vacate are incorporated herein by specific reference.

2. In *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla.2014), the Florida Supreme Court explained then when presented with qualifying newly discovered evidence:

the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact

of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial or resentencing must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a death sentence and unanimously determine that the aggravators outweigh the mitigating factors. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

3. This is new Florida law that did not exist when Mr. Walls previously presented his original 3.850/3.851 *Strickland* and *Atkins/Hall* claims. Accordingly, Mr. Walls' previously presented claims must be reevaluated in light of the new Florida law. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So.3d 40, 59. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. The new

Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. A previous rejection of a death sentenced defendant's post-conviction claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

5. This Court must re-visit and re-evaluate the rejection of Mr. Walls' previously presented *Strickland* claims in light of the new Florida law which would govern at a resentencing. When such a re-evaluation is conducted, it is apparent that the outcome would probably be different and that Mr. Walls would likely receive a binding life recommendation from the jury.

CONCLUSION

Based on the foregoing, Mr. Walls requests: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments and *Hurst v. Florida*, *Perry v. State* and *Hurst v. State*; 2) an opportunity for further evidentiary development to the extent necessary; and, 3) on the basis of the reasons presented herein, and Order vacating his death sentence and granting a new penalty phase, or, in the alternative, the imposition of a life sentence.

**CERTIFICATION PURSUANT TO FLA. R. CRIM. P.
3.851(e)**

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies they endeavored to fully discuss and explain the contents of this motion with Mr. Walls, and that counsel to the best of their ability have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,

/s/ Maria E. DeLiberato

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/s/ Julissa R. Fontán

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/s/Chelsea Shirley

Chelsea Shirley
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Counsel for Mr. Walls

CERTIFICATE OF SERVICE

We HEREBY CERTIFY that a true copy of the foregoing Successive Motion to Vacate Death Sentence has been electronically filed with Clerk for the 1st Judicial Circuit, Okaloosa County, and electronically served upon Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, the Office of the State Attorney, John Molchan, jmolchan@sao1.org, dmoffitt@sao1.org, and OKA-DIV002@SA01.ORG, and the Honorable William F. Stone, Frannie.Natalie@AFLCOURTS1.GOV and OKA.DIV2.ESERVE@FLCOURTS1.GOV on this 10th day of January, 2017.

/s/ Maria E. DeLiberato

Maria E. DeLiberato
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Assistant Capital Collateral Counsel
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/s/ Julissa R. Fontán

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/s/Chelsea Shirley

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12973 N. Telecom Parkway
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813-558-1600
Shirley@ccmr.state.fl.us

Counsel for Mr. Walls

3
☐ PROBATION VIOLATION
(Check if Applicable)

IN THE CIRCUIT COURT,
FIRST JUDICIAL CIRCUIT,
IN AND FOR
OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA

DIVISION A

- vs -

CASE NUMBER: 87-00856-CFA

WALLS, FRANK ATHEN
Defendant

** OFFICIAL RECORDS **
BK 1606 PG 466

J U D G M E N T

The Defendant WALLS, FRANK ATHEN, being personally
before this Court represented by PUBLIC DEFENDER, his attorney of
record and having:

- ☒ Been tried and found guilty of the following crime(s).
☐ Entered a plea of guilty to the following crime(s).
☐ Entered a plea of nolo contendere to the following crime(s).

COUNT	CRIME	OFF STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
001	BURGLARY OF STRUCTURE	81002	T	87-00856-CFA
004	1ST DEGREE MURDER	78204 1A	C	87-00856-CFA
005	1ST DEGREE MURDER (Premeditated) & FELONY	78204 1A	C	87-00856-CFA
006	BURGLARY WHILE ARMED	81002	F	87-00856-CFA
008	KIDNAPPING	78701 2	F	87-00856-CFA
009	KIDNAPPING	78701 2	F	87-00856-CFA
010	PETIT THEFT 1ST OFFENSE	812014	S	87-00856-CFA

and no cause having been shown why the defendant should not be adjudicated
guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the
crime(s).

The Defendant is hereby ordered to pay the sum of twenty dollars (\$20.00)
pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is
further ordered to pay the sum of three dollars (\$3.00) as a court cost
pursuant to F.S. 943.25(3).

- ☐ The defendant is ordered to pay an additional sum
of two dollars (\$2.00) pursuant to F.S. 943.25 (8).
(This provision is optional; not applicable unless
checked).

DEFENDANT Frank A. Walls

CASE NO: 87-856

Imposition of Sentence ☐
Stayed and Withheld
(Check if Applicable)

The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places Defendant on probation for a period of _____ under the supervision of the Department of corrections (Conditions of probation set forth in separate order).

Sentence Deferred ☐
Until Later Date
(Check if Applicable)

The Court hereby defers imposition of sentence until _____ (date) ** OFFICIAL RECORDS **
BK 1486 PG 46B

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at OKALOOSA County, FLORIDA this 18th day of June, A.D., 1992.

G. Robert Barron
CIRCUIT JUDGE
G. ROBERT BARRON

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

Robert M. Clarkhead Bailiff
NAME AND TITLE

DONE AND ORDERED in Open Court at OKALOOSA County, FLORIDA this 18th day of June, A.D., 1992.

I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Frank A. Walls and that they were placed thereon by said defendant in my presence in Open Court this date.

G. Robert Barron
CIRCUIT JUDGE
G. ROBERT BARRON

FILED
JUN 22 AM 7 56
OKALOOSA COUNTY
CLERK OF CIRCUIT COURT
TALLAHASSEE, FL.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E ** OFFICIAL RECORDS **
(As to Count 001) BK 1486 PG 469

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision
if applicable)

☐ and the Court having on _____ deferred
imposition of sentence until this date.

☐ and the Court having placed the Defendant on
probation and having subsequently revoked the
Defendant's probation by separate order entered
herein,

IT IS THE SENTENCE OF THE LAW that;

☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5%
surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to custody of the Department of
corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of
OKALOOSA County, FLORIDA

To be imprisoned

☐ For a term of Natural Life.

☒ For a term of 5 years .

☐ For an indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____
on probation under the supervision of the
Department of Corrections according to the
terms and conditions of probation set forth in
a separate order entered herein.

☐ However, after serving a period of _____
imprisonment in prison the balance of such
sentence shall be suspended and the Defendant
shall be placed on probation for a period
of _____ under supervision of
the Department of Corrections according to
the terms and conditions of probation set forth in
a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1686 PG 470
- Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run ____ consecutive to X concurrent with (check one) the sentence set forth in count V above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E

** OFFICIAL RECORDS **
BK 1686 PG 471

(As to Count 004)

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision
if applicable)

☐ and the Court having on _____ deferred
imposition of sentence until this date.

☐ and the Court having placed the Defendant on
probation and having subsequently revoked the
Defendant's probation by separate order entered
herein,

IT IS THE SENTENCE OF THE LAW that;

☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5%
surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to custody of the Department of
corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of
OKALOOSA County, FLORIDA

To be imprisoned

☒ For a term of Natural Life.

☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____
on probation under the supervision of the
Department of Corrections according to the
terms and conditions of probation set forth in
a separate order entered herein.

☐ However, after serving a period of _____
imprisonment in prison the balance of such
sentence shall be suspended and the Defendant
shall be placed on probation for a period
of _____ under supervision of
the Department of Corrections according to
the terms and conditions of probation set forth in
a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1686 PG 472
- Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run X consecutive to ____ concurrent with (check one) the sentence set forth in count V above.
- Capital Offense (X) It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E ** OFFICIAL RECORDS **
(As to Count 005) BK 1686 PG 473

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

- (Check either provision if applicable)
- ☐ and the Court having on _____ deferred imposition of sentence until this date.
- ☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that;

- ☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5% surcharge required by F.S. 960.25.
- ☒ The Defendant is hereby committed to custody of the Department of corrections
- ☐ The Defendant is hereby committed to the custody of the Sheriff of OKALOOSA County, FLORIDA

To be imprisoned

- ☐ For a term of Natural Life.
- ☒ For a term of DEATH.
- ☐ For an indeterminate period of 6 months to ____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in prison the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1686 PG 474
- Consecutive/Concurrent ☐ It is further ordered that the sentence imposed for this count shall run ____ consecutive to ____ concurrent with (check one) the sentence set forth in count ____ above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E

** OFFICIAL RECORDS **
BK 1686 PG 475

(As to Count 006)

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision
if applicable)

☐ and the Court having on _____ deferred
imposition of sentence until this date.

☐ and the Court having placed the Defendant on
probation and having subsequently revoked the
Defendant's probation by separate order entered
herein,

IT IS THE SENTENCE OF THE LAW that;

☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5%
surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to custody of the Department of
corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of
OKALOOSA County, FLORIDA

To be imprisoned

☐ For a term of Natural Life.

☒ For a term of 20 years .

☐ For an indeterminate period of 6 months to ____ years.

☐ Followed by a period of _____
on probation under the supervision of the
Department of Corrections according to the
terms and conditions of probation set forth in
a separate order entered herein.

☐ However, after serving a period of _____
imprisonment in prison the balance of such
sentence shall be suspended and the Defendant
shall be placed on probation for a period
of _____ under supervision of
the Department of Corrections according to
the terms and conditions of probation set forth in
a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☒ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ___ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1686 PG 476
- Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run ___ consecutive to X concurrent with (check one) the sentence set forth in count V above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E

** OFFICIAL RECORDS **
BK 1686 PG 477

(As to Count 008)

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision
if applicable)

☐ and the Court having on _____ deferred
imposition of sentence until this date.

☐ and the Court having placed the Defendant on
probation and having subsequently revoked the
Defendant's probation by separate order entered
herein,

IT IS THE SENTENCE OF THE LAW that;

☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5%
surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to custody of the Department of
corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of
OKALOOSA County, FLORIDA

To be imprisoned

☐ For a term of Natural Life.

☒ For a term of 20 years .

☐ For an indeterminate period of 6 months to ____ years.

☐ Followed by a period of _____
on probation under the supervision of the
Department of Corrections according to the
terms and conditions of probation set forth in
a separate order entered herein.

☐ However, after serving a period of _____
imprisonment in prison the balance of such
sentence shall be suspended and the Defendant
shall be placed on probation for a period
of _____ under supervision of
the Department of Corrections according to
the terms and conditions of probation set forth in
a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm - 3 year
mandatory minimum

☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking
mandatory minimum

☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.

Retention of
Jurisdiction

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

** OFFICIAL RECORDS **
BK 1686 PG 478

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ____ consecutive to X concurrent with (check one) the sentence set forth in count V above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E

** OFFICIAL RECORDS **

(As to Count 009)

BK 1486 PG 479

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

(Check either provision
if applicable)

☐ and the Court having on _____ deferred
imposition of sentence until this date.

☐ and the Court having placed the Defendant on
probation and having subsequently revoked the
Defendant's probation by separate order entered
herein,

IT IS THE SENTENCE OF THE LAW that;

☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5%
surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to custody of the Department of
corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of
OKALOOSA County, FLORIDA

To be imprisoned

☐ For a term of Natural Life.

☒ For a term of 20 years .

☐ For an indeterminate period of 6 months to ____ years.

☐ Followed by a period of _____
on probation under the supervision of the
Department of Corrections according to the
terms and conditions of probation set forth in
a separate order entered herein.

☐ However, after serving a period of _____
imprisonment in prison the balance of such
sentence shall be suspended and the Defendant
shall be placed on probation for a period
of _____ under supervision of
the Department of Corrections according to
the terms and conditions of probation set forth i
a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 1834 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1486 PG 480
- Consecutive/Concurrent ☐ It is further ordered that the sentence imposed for this count shall run ____ consecutive to X concurrent with (check one) the sentence set forth in count V above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

S E N T E N C E

** OFFICIAL RECORDS **
BK 1686 PG 481

(As to Count 010)

The Defendant, being personally before this Court, accompanied by his attorney, PUBLIC DEFENDER, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

- (Check either provision if applicable).
- ☐ and the Court having on _____ deferred imposition of sentence until this date.
- ☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that;

- ☐ The Defendant pay a fine of \$ _____, plus \$ _____ as the 5% surcharge required by F.S. 960.25.
- ☐ The Defendant is hereby committed to custody of the Department of corrections
- ☒ The Defendant is hereby committed to the custody of the Sheriff of OKALOOSA County, FLORIDA

To be imprisoned

☐ For a term of Natural Life.

☒ For a term of 2 months .

☐ For an indeterminate period of 6 months to ____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in prison the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

- Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provision of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.
- Drug Trafficking mandatory minimum ☐ It is further ordered that the ____ year minimum provisions of F.S. 893.135(1)() () are hereby imposed for the sentence specified in this count.
- Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of set forth in a separate order or stated on the record in open court.
- Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(A). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 0060 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):
- ** OFFICIAL RECORDS **
BK 1586 PG 482
- Consecutive/Concurrent ☐ It is further ordered that the sentence imposed for this count shall run ____ consecutive to X concurrent with (check one) the sentence set forth in count V above.

Defendant WALLS, FRANK ATHEN
Case No: 87-00856-CFA

Consecutive/Concurrent
(As to other convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ___ consecutive to ___ concurrent with (check one) the following:

☐ Any active sentence being served.

[-] Specific sentences:

** OFFICIAL RECORDS **
 BK 1586 PG 483

In the event the above sentence is to the Department of Corrections, the Sheriff of OKALOOSA County, FLORIDA is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and sentence.

The Defendant in Open Court was advised of his right to appeal from this Sent by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends

DONE AND ORDERED in Open Court at OKALOOSA County,
FLORIDA this 29TH day of JULY A.D., 1992

G ROBERT BARRON
CIRCUIT JUDGE

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA
STATE OF FLORIDA,

** OFFICIAL RECORDS **
BK 1686 PG 485

Plaintiff,

-vs-

CASE NO. 87-856

FRANK A. WALLS,

Defendant.

"AGGRAVATING AND MITIGATING CIRCUMSTANCES CONSIDERED BY
THE COURT UPON IMPOSITION OF THE DEATH PENALTY"

As to Count V, the First Degree Premeditated and Felony Murder of Ann Peterson, the Court hereby imposes a sentence of death by electrocution. This recommendation is supported by the Jury Advisory Verdict which unanimously recommended a sentence of death. Arriving at this determination, the Court finds that the evidence adduced at trial supports the following findings of fact.

The evidence beyond any reasonable doubt, shows that the defendant stealthily entered the residence of Edward Alger and Ann Peterson during the early morning hours of July 22, 1987. At the time of entering, at least two vehicles were parked in front of the residence giving the clear impression that the residence was in fact occupied. Immediately upon entering, the defendant cut a length of curtain cord and proceeded to the bedroom where Edward Alger and Ann Peterson were sleeping. The defendant armed with a knife and a pistol, intentionally awakened the couple by turning the light on and kicking over a large fan. At gunpoint, the defendant forced Ann Peterson to bind Edward Alger's wrist and ankles with the curtain cord. The defendant

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then took Ann to the living room where he secured another piece of cord, tied her, and gagged her with a sock. The Defendant then returned to the back bedroom to find Edward attempting to free himself. Edward Alger, nude, unarmed and with his ankles still bound, struggled desperately with the defendant fighting for his life. His feet were cut and scratched where he had stepped through the grill on the overturned fan. Edward still fought to live by biting the defendant on the inside of his thigh. After gaining the advantage and while Edward was on the floor, the defendant slashed his throat with a knife. The defendant then proceeded to shoot Edward three times (once in the neck, with the bullet shattering some of his teeth; once in the forehead; once in the side of the head). The defendant then returned to the living room and struggled with Ann, ripping off her night shirt. The defendant then moved Ann into an empty front bedroom. Ann was found nude face down in a sofa throw pillow. She had suffered a gun shot wound to the head that caused her death. Prior to the infliction of that wound, the defendant had informed her of the fate of boyfriend, Edward. She was curled up crying as she was told of what had happened to Edward. By the defendant's own admission it was his intent to leave no witnesses. His first shot at her went awry and struck her cheek. Upon being shot the first time she began crying and screaming, then the defendant fired a second fatal shot into her head.

After completing the murder the defendant stole Edward's wallet, money and a fan. He then returned to his own trailer, showered, changed clothes, and stored the fan in the shed. The wallet contents belonging to Edward were disposed of in a garbage

dumpster behind a high school. He then returned the automobile he had taken during the car lot burglary committed earlier in the evening (before the murders). Defendant then went to a topless bar where he spent the victim's money on beer and tips for the employees of the topless bar.

** OFFICIAL RECORDS **
BK 1686 PG 487

The evidence against the defendant included: a taped confession, an oral confession, the gun and knife used in the murders and recovered from the defendant's residence, the wallet and fan taken from the victims and recovered in the defendant's residence, microanalysis evidence, serological evidence, firearm/ballistic evidence, fingerprint evidence, and blood dispersement analysis evidence. The identity of the killer is without a doubt.

After studying, considering and weighing all the evidence the Court finds the following aggravating factors have been proved beyond any reasonable doubt.

1. The defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person. (F.S. 921.141(5)(b)(1987))

The evidence presented in the case proves that the defendant first killed Edward Alger. He then executed Ann Peterson. The Florida Supreme Court in Zeigler v. State, 580 So2d 127 (1991) held that this aggravating factor was properly applied in cases where contemporaneous crimes are committed upon separate victims.

2. The murder was committed while the defendant was engaged in the commission of a burglary. The murder was also committed while the defendant was engaged in the

commission of a kidnapping. (F.S. 921.141(5)(d)

(1987)) The crime of kidnapping was accomplished when Ann, at gunpoint, was forced from her bed, taken to the living room, bound and gagged. Subsequently, Ann was moved to yet another room. Ann was murdered shortly after she was moved to the second room (and after Edward was murdered). After her murder Edward's wallet, money, and a fan were taken from their mobile home.

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest. (F.S. 921.141(5)(e) (1987))

The defendant, by his own admission, fully intended to eliminate Ann Peterson as a witness to the murder of Edward Alger and other crimes. The defendant confessed that Ann Peterson asked if Edward was "O.K." and he told her "No." He further stated that she knew what he had done to Edward. The defendant made no attempt to conceal his identity, yet took elaborate steps to avoid detection. The defendant stated, "I don't want...no witnesses."

Kokal v. State, U 492 So2d 1317 (1986).

4. The murder was committed for pecuniary gain.

(F.S. 921.141(5)(f) (1987)) The Court is aware of the prohibition against the doubling of aggravated factors (i.e., considering both the burglary and pecuniary gain). Even though burglary was the underlying felony for the first degree felony murder conviction, the murder was also committed during the commission of a kidnapping and F.S. 921.141(5)(d) could stand on a burglary or a

kidnapping. Upon consideration of the total circumstances, the fact that a burglary also occurred does not prevent the Court from considering the pecuniary gain aspect of the crime.

** OFFICIAL RECORDS **

BK 1506 PG 489

Evidence of pecuniary gain was clear by the recovery of Edward's wallet and Edward and Ann's fan from the trailer occupied by the defendant. It was further established by the defendant's statement that he went there to get some things and had in fact taken between \$200-\$300 from the trailer.

5. The murder was especially heinous, atrocious, or cruel. (F.S. 921.141 (5)(h) (1987)) The acts of this defendant and the obvious torture and suffering of the victim set this crime apart from the norm of capital felonies.

While sleeping in the security of her own home with her boyfriend, she was intentionally awakened by the defendant, a gun and knife-wielding stranger. She was forced at gunpoint to tie up her boyfriend, Edward, with curtain cord provided by the defendant. Ann was then taken by the defendant to the living room where she was bound and gagged. She was left to hear the violent life and death struggle between the defendant and her boyfriend. She was also there to hear the three gun shots and realize that it was the intruder who had returned to her and not Edward. Ann begged the defendant to tell her if Edward was alright; the defendant told her "No." The defendant has confessed that at that point he was

verbally taunting and terrifying her. The defendant and Ann Peterson wrestled and struggled and he ripped off her only clothing, a night shirt, leaving her completely naked. He then took her to the front bedroom where he untied her. The defendant has confessed that he intended to leave no witnesses. We will never know the full extent of the taunting, cruel teasing, and mental suffering inflicted upon and suffered by Ann Peterson. Instead of a swift, efficient, and "painless" killing, the defendant fired one shot into Ann Peterson's cheek and as she lay there screaming in fear and pain, and while she was curled up crying on the floor, the defendant ended her life by firing a second shot point blank into her head.

To Ann Peterson, the knowledge of her own certain impending death, at the hands of this wicked intruder into the night, knowing that he had already taken the life of Edward Alger, must have brought a level of terror, panic, and utter hopelessness beyond comprehension.

6. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (F.S. 921.141(5)(f) (1987))

The defendant burglarized a used car lot and took an automobile at approximately 8-8:30 p.m. on the night before the murders. He went to two bars and one "strip joint" after committing the burglary of the used car lot. As a result of the burglary the defendant had accumulated assorted stolen property which he took

back to and stored at his own trailer. Between approximately 1:45 a.m. and 2:25 a.m. the defendant forcibly entered (using an ice pick-like instrument) the Alger/Peterson mobile home. Parked in front of the home were a minimum of two vehicles giving the clear impression that the home was at that very time occupied. He cut curtain cord immediately upon entering. He proceeded directly to the back bedroom and intentionally awakened both victims. He made no effort to conceal his identity. The property that he ultimately took was taken from the living room area, and the taking of that property did not necessitate waking and confronting the victims. He bound both victims and gagged one. He separated the victims. After killing Edward he then returned to Ann, informed her of what he had done to Edward and then proceeded to kill Ann.

After the murders the defendant checked to make sure "everything was alright", i.e., making sure he left nothing to connect him with the crime. He fled in the stolen automobile which he had parked near the murder scene. He took the victim's property to his trailer. He showered and changed clothes. Then he removed Alger's personal papers from the wallet and put his own in. The wallet contents of the victim were then tossed in a garbage dumpster behind a local high school. The defendant proceeded (now approximately 3:00 a.m.) to the same "strip joint/topless bar" where he freely spent the victim's money on drinks and dancers.

The totality of the defendant's conduct before, during and after the murders elevates his premeditation to the heightened level needed to constitute an aggravating factor.

** OFFICIAL RECORDS **
BK 1586 PG 492

After studying, considering and weighing all the evidence in the case, the Court makes the following findings of fact as to the mitigating circumstances. The Court has considered the testimony of the defendant's mother, father, a psychiatrist, and two psychologists as well as numerous photographs of the defendant. The Court has considered all the possible mitigating circumstances listed under F.S. 921.141(6) (1987) and finds as follows as to each possible mitigating circumstance.

1. The defendant has no significant history of prior criminal activity (F.S. 921.141(6)(a)).
2. Although there was some testimony from one psychologist (Dr. Hagerott) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (F.S. 921.41(6)(b)), the Court does not believe that this mitigating factor was proved by a preponderance of the evidence. Dr. Hagerott's evaluation consisted of approximately a four hour examination conducted five years after the event. Neither the other defense psychologist nor the defense psychiatrist who each examined the defendant and/or treated him prior to the murders and at a point in time much closer to the murders would testify that the defendant was under the influence of extreme mental or emotional disturbance. To the contrary, they testified that the defendant in fact had the capacity to appreciate the

criminality of his conduct or to conform his conduct to the requirement of law.

** OFFICIAL RECORDS **
BK 1686 PG 493

Furthermore, Dr. Valentine, defense psychiatrist, testified that the defendant had previously been diagnosed and treated for manic depression, but testified further that the defendant was no longer being treated for that diagnosis and was, to Dr. Valentine's knowledge, under no medication for any emotional disturbance either at the time of the murders or at the time of trial.

The Court also observed that during the course of the week long trial the defendant, who at the time was taking no medication and was on trial for his life, exhibited absolutely no symptoms of emotional stress or disturbance, and appeared to remain calm and lucid at all times and participated actively with his counsel during the jury selection process and the trial of the case.

3. F. S. 921.141(6) (c), (d) and (e) do not factually apply to this case.

4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was NOT (emphasis added) substantially impaired. (F.S. 921.141 (6) (f).)

5. The age of the defendant at the time of the crime was 19 years and 10 1/2 months. (F.S. 921.141 (6) (g).)

As to the non-statutory mitigating circumstances, the Court has considered the following:

1. The defendant was classified by school counselors and psychologists as being emotionally handicapped based on his "acting out" behavior.

2. The defendant had apparent brain dysfunction possibly caused by slight brain damage, although not medically diagnosed. This dysfunction was manifested by the defendant's difficulty in learning mathematical and verbal skills. ** OFFICIAL RECORDS **
BK 1686 PG 494

3. The defendant's intelligence quotient decreased from the time he was school age to the present. His I.Q. scores dropped from "Average" level to "Low Normal." Dr. Hagerott testified that, in her opinion, the defendant is extremely immature and his behavioral control is in many ways consistent with a child in the middle to late elementary school age, and that the defendant is functioning intellectually at about the age of 12 or 13.

4. The defendant confessed to law enforcement officials and cooperated fully with the investigation. He voluntarily surrendered to authorities when apprehended.

5. The defendant maintained a loving relationship with his parents and sibling brother, and at times physically carried his brother around when his brother was incapacitated due to surgery from a club foot disorder.

6. The defendant was a good worker during the time periods he was employed.

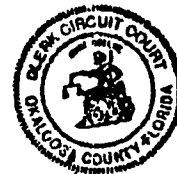
7. The defendant had at times exhibited kindness and compassion toward weak, crippled or helpless persons and animals.

The Court finds that there are no other non-statutory mitigating circumstances. Even if the Court were to find that the defendant established each mitigating factor that he raised, that would not outweigh the overwhelming evidence of aggravating circumstances or even a single aggravating circumstance established

by the evidence in this case.

**** OFFICIAL RECORDS ****
BK 1686 PG 495

Based on the overwhelming evidence of aggravation the Court finds that the aggravating circumstances substantially outweigh the mitigating circumstances and this Court will therefore follow the unanimous recommendation of the jury and impose upon Frank A. Walls a sentence of death by electrocution for the First Degree Premeditated and Felony Murder of Ann Peterson. The defendant is hereby remanded to the custody of the Department of Corrections for the implementation of this sentence.



FILE# 1207432
OKALOOSA COUNTY, FLORIDA

RCO: JUL 31 1992 @ 7:43 AM
NEWMAN C. BRACKIN, CLERK

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APPENDIX

E

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-959**

FRANK WALLS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL
CIRCUIT, IN AND FOR OKALOOSA COUNTY, STATE OF FLORIDA**

RESPONSE TO ORDER TO SHOW CAUSE

**MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251**

**JULISSA R. FONTÁN
Assistant CCRC
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INTRODUCTION

Mr. Walls'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 Walls *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 here. Denying Walls *Hurst* relief because his sentence became final in 1995, 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

This appeal presents an important issue: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than limiting *Hurst* relief to post-*Ring* death sentences. Walls respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Walls also

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

requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.²

ARGUMENT

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

To deny Mr. Walls retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Walls’ right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

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

² Depriving Walls 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).

collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.³

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Walls the relief being granted in

³ The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Walls'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"), and *Perry v. State*, 210 So. 3d 630, 639 (Fla. 2016). Second, the challenge Mr. Lambrix made dealt with an idiosyncratic issue—the "retroactivity" of Florida's *new capital sentencing statute*. He did not argue, as Appellant does here, for the retroactivity of the *constitutional rules* arising from the *Hurst* decisions. Finally, to the extent the Eleventh Circuit gratuitously reached those issues it did not address the specific arguments about the federal retroactivity of *Hurst v. Florida* that are raised here. And it did not discuss in any fashion the retroactivity of *Hurst v. State*.

scores of materially indistinguishable collateral cases. Denying Walls *Hurst* retroactivity because his death sentence became final in 1994, 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. The retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring).

⁴ This Court is obligated to meaningfully address Walls'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").

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;⁵ 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;⁶ whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*,

⁵ *See, e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

⁶ *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (opinion issued within one year after briefing completed, before *Ring*), with *Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted).

803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the other side of this Court's current retroactivity cutoff.⁷

Moreover, under the Court's current approach, litigants, like Mr. Walls, 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., Miller v. State*, 926 So. 2d

⁷ Adding to the “fatal or fortuitous accidents of timing” as described by Justice Lewis, Mr. Card's Petition for Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, for reasons unknown, Mr. Card's Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm> with *Bowles v. Florida*, Case No. 01-9716, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm> (last visited October 3, 2017).

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).⁸

B. The retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process.

This Court’s retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without “some ground of difference that rationally explains the different treatment.” *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment by a state actor like this Court, the question becomes “whether there is some ground of difference that rationally explains the different treatment” *Id.*; see also *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The

⁸ 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 Mr. Walls, should receive retroactivity under the “fundamental fairness” doctrine, which this Court has previously applied in other contexts, see, e.g., *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, see *Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. See 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should “simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived.”). Mr. Walls, who raised *Ring*-like challenges at trial and on direct appeal, and *Ring* challenges in post-conviction, urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between those capital defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the State's justification for that line must satisfy strict scrutiny. 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 the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Walls violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*,

523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. See *Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring); *Evitts*, 469 U.S. at 393 (state procedures employed “as ‘an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant’” must comport with due process). Instead, defendants have “a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest life and liberty interests that are protected by due process. See, e.g., *Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring).

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

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state

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

The Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had “a procedural component.” *Id.* at 734. *Miller* did “not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*.” *Miller*, 567 U.S. at 483. Instead, “it mandate[d] only that a sentence follow a certain process—considering an offender’s youth and attendant

characteristics—before imposing a particular penalty.” *Id.* Despite *Miller*’s procedural mandates, the Court in *Montgomery* warned against “conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish,” *id.* at 735, and that the necessary procedures do not “transform substantive rules into procedural ones,” *id.*

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

The *Hurst* decisions announced substantive rules that must be applied retroactively to Walls by this Court under the Supremacy Clause. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those aggravators together are “sufficient” to justify imposition of the death penalty; and (3) that those aggravators together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. See *Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient

immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

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

decision. *See Montgomery*, 136 S. Ct. at 735 (state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable 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) (explaining that “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”).

III. Mr. Walls’ death sentence violates *Hurst*, and the error is not “harmless.”

Walls was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme.⁹ In *Hurst v. Florida*, the United States Supreme Court held that

⁹Mr. Walls was convicted of the felony murders of Edward Alger and Ann Peterson in 1987. The jury recommended life for the murder of Alger and death for the murder of Peterson by a vote of 7-5. This Court vacated those convictions and sentences and remanded for a new trial. *Walls v. State*, 580 So.2d 131 (Fla. 1991). Walls was convicted again after a retrial, and the jury unanimously recommended

Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Supreme Court held that the jury, not the judge, must make the findings required to impose death. *Id.*

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

death for the murder of Peterson. The convictions and sentence were affirmed on direct appeal. *Walls v. State*, 641 So.2d 381 (Fla. 1994)(cert denied)(*Walls v. Florida*, 513 U.S. 1130)(1995).

Walls' jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being repeatedly instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a generalized recommendation for death. The record does not reveal whether his 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.

The "harmless error" doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury's unanimous recommendation to sentence Walls to death.¹⁰ This Court's line of cases that *Hurst* errors are harmless 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. Walls'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

¹⁰*Hurst* errors should be deemed "structural" and not subject to harmless review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

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). Walls's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. Without the *Hurst* error, where the jury was properly apprised of its fact-finding role, there is a reasonable likelihood that it would have afforded greater weight to Walls's mitigation. As such, the Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional

proceeding.¹¹ *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in mitigation context Eighth Amendment is violated when there is uncertainty about jury's vote).

The jury's recommendation in Walls'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. As indicated by the affidavits filed in the circuit court, counsel's approach to the mitigation surely would have differed had counsel known that the jury would render the findings regarding the weight of aggravation and mitigation. Mr. Walls should at least be afforded an evidentiary 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

¹¹Proper judicial review measures the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated in *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court explained that the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380.

basis on which the jury *actually rested* its verdict.”). In Walls’s case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. The logic of *Sullivan* applies equally here:

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 Walls’s case too, any reliance on his advisory jury’s recommendation would constitute a violation of the Sixth Amendment.

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

This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida’s pre-*Hurst* jury determinations, including the advisory recommendation in this case, did not incorporate the beyond-a-reasonable-doubt standard.

To the extent any of the aggravators applied to Walls were based on prior convictions, the judge’s finding of such aggravators does not render the *Hurst* error harmless. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the “sufficiency” of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst*”).

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Walls, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Charmaine Millsaps, charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, on this 16th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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APPENDIX

F

IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS
Appellant,

v.

SC17-959

STATE OF FLORIDA
Appellee.

RESPONSE TO STATE'S REPLY TO ORDER TO SHOW CAUSE

The State asserts that Mr. Walls is not entitled to any *Hurst*¹ relief under this Court's current precedent because his sentence became final before *Ring v. Arizona*². This *Ring*-based cutoff is unconstitutional and should not be applied to Walls. Denying Walls *Hurst* relief because his sentence became final in 1995, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. This Court should allow full briefing and oral argument.

As Mr. Walls asserted in his initial response, depriving him of 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);

¹ *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

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

see also Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In fact, it appears that this Court's truncated procedure in cases in Mr. Walls's posture is being held against capital defendants who have complied with this Court's limitation on the scope and substance of the Responses on the Orders to Show Cause. *See Hannon v. State*, --So. 3d. ---, 2017 WL 4944899, *13 (November 1, 2017)(Faulting Hannon for purportedly failing to raise a *Caldwell* claim, though he, like Walls, was similarly limited in scope and substance. "The dissent asserts that Hannon raises a *Caldwell* claim in this Court. It is true that Hannon challenged his sentences under *Caldwell* in the circuit court, however, he did not raise that claim here.").

Mr. Walls respectfully renews his requests for the opportunity to file a full, untruncated brief in this mandatory-jurisdiction appeal pursuant to the standard Florida Rules of Appellate Procedure, and for the opportunity to present oral argument pursuant to Rule 9.320. He does not waive or abandon any of his claims.

2. The State is incorrect in asserting that *Hitchcock* addressed the federal retroactivity arguments Mr. Walls raised in this proceeding.

The State is incorrect that Mr. Walls "makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in *Hitchcock*, *Asay VI*, and *Lambrix*." (Response, p. 3). In fact, the 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 that Mr. Walls raised in response to this Court’s Order to Show Cause.

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, *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 v. State*, 387 So.2d 922 (Fla. 1980).”). The exclusive reliance on state law is evident from *Asay* itself. *See* 210 So. 3d at 16 (“To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.”).³

Asay did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Mr. Walls’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

³ As this Court has repeatedly emphasized, *Witt* addressed 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).

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 Mr. Walls’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*.”).

During the nearly eight months between this Court’s decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those matters in its exclusively-state-law analysis, and imploring the courts to explicitly address federal law. Those defendants, appellants, and petitioners, as Walls has 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 federal 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* does not even mention 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 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 here does not contend otherwise.

To the extent the State suggests that Mr. Walls's federal arguments have been addressed in other cases, those decisions are not applicable here. As Walls noted in his initial Response, 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 Mr. Walls this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017).

3. The State's cursory arguments in opposition that *Hurst* should not be applied retroactively to Walls under federal law are not persuasive.

Adding little to no analysis, the State makes the blanket assertion that “*Montgomery* does not apply at all.” (Response, p. 10). The State fails to address Mr. Walls’s argument that in *Montgomery*, the U.S. Supreme Court held that because *Miller v. Alabama*, 567 U.S. 460 (2012), “determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.” 136 S. Ct. at 734 (internal citations omitted).

Additionally, “*Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a

line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.” *Id.*

Likewise, *Hurst* determined that a defendant sentenced to death without a jury unanimously finding all statutorily necessary facts is an unconstitutional penalty. Like *Miller*, *Hurst* did not bar capital punishment for all defendants, but it did bar the sentence for all but the rarest of defendants. *Hurst* drew a line between those defendants whose murders do not rise to the most aggravated and least mitigated, and those whose capital offenses do. And, “the fact that the [death penalty] could still be a proportionate sentence for the latter kind of offender does not mean that all other [capital defendants] imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.” *Montgomery*, 136 S. Ct. at 734.

Lastly, and importantly for purposes of *Hurst* retroactivity analysis, the Court found the *Miller* rule substantive in *Montgomery* even though the rule had “a procedural component.” *Id.* at 734. One cannot conflate “a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant’s culpability.” *Id.* at 734-35. 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.* In *Miller*, the decision “bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.” *Id.* at 734.

4. Mr. Walls’s death sentence violates *Caldwell*.

The State, acknowledging that Mr. Walls raised a *Caldwell*⁴ claim both below and before this Court, asserts that there is no *Caldwell* violation. (Response, p. 13-15). To the contrary, Mr. Walls’s death sentence is unconstitutional because the jury was repeatedly told that its sentencing recommendation was advisory and non-binding. Under *Caldwell*, a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.” *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

⁴ *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In *Caldwell*, the prosecutor responding to defense counsel's argument stated in his argument before the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id.* at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.

This Court has only rejected *Caldwell* challenges under the old sentencing scheme where the judge, not the jury, determined the sentence. This Court has yet to squarely address a *Caldwell* challenge since *Hurst v. Florida*:

Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where 'the court [was] the final decision-maker and the sentencer – not the jury.' *Combs v. State*, 525

So2d 853, 857 (1988). In *Hurst v. Florida*, 577 U.S. __, __ (2016)(slip op., at 10), however we held that process, ‘which required the judge alone to find the existence of an aggravating circumstance,’ to be unconstitutional.

With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge...Because petitioners here have raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court’s refusal to correct that error.

Truehill v. Florida, 538 US ___ (2017)(16-9448)(Justices Sotomayor, with whom Justice Ginsburg and Justice Breyer join, dissenting from the denial of certiorari). *See also, Hannon v. State*, --So. 3d. ---, 2017 WL 4944899, *13 (November 1, 2017)(Pariente, J., dissenting)(Finding the *Hurst* error after two 12-0 recommendations harmless. “On the merits, I believe that the *Caldwell* claim further strengthens Hannon’s Eighth Amendment argument.”).

Mr. Walls’s advisory panel was instructed that the responsibility for determining the appropriateness of the sentence belonged to the trial court, and such reliance violates the Eighth Amendment based on *Caldwell*.

CONCLUSION

This Court should hold that state and federal law requires the *Hurst* decisions to be applied retroactively to Walls, that his death sentence violates *Caldwell*, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Charmaine Millsaps, charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, on this 6th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to State's Reply to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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APPENDIX

G

1 in just a few moments with the arguments of counsel. The
2 arguments will be presented to you in accordance with the
3 evidence that you heard yesterday, as all of you are very much
4 aware, I'm sure, the defense presented evidence in mitigation.
5 The state basically amounts to they relied on the aggravating
6 factors they had already presented during their case in chief.
7 In just a few moments the attorneys will have an opportunity
8 to present a closing argument to you on those factors that
9 they feel you should consider in rendering your recommendation
10 in this case. The procedure that we will follow will be just
11 a little bit different than it was in the initial final
12 arguments in the guilt phase in that there will only be two
13 closing arguments. Mr. Williams will present a closing argument
14 to you on behalf of the state, and then Mr. Sewell will argue
15 on behalf of the defense. Following those closing arguments I
16 will then instruct you on the law that you're to follow, and
17 you are then to retire to the jury room to consider your
18 recommendation. I would ask, please, that you give the
19 attorneys your very closest attention during the course of
20 their closing arguments. Mr. Williams.

21 WILLIAMS: Thank you, your Honor. May it please the
22 court? Ladies and gentlemen, good morning. This is the last
23 opportunity that I'll have to speak to you this long week.
24 I want to tell you how much I appreciate your attention
25 throughout these proceedings, and I know it's been difficult.

1 It's been long, there have been breaks. You had to spend the
2 night away from home, and that's not easy to do, and we
3 do appreciate it. The purpose of this phase is for you to
4 make a recommendation to the judge as to what you think the
5 sentence should be since you found Frank Walls guilty of
6 premeditated and felony murder of Ann Peterson, and that's
7 the only individual that the state is seeking the death
8 penalty on, that's the only charge, and that's all the judge
9 is going to instruct you. The only thing you're to consider is
10 whether or not you believe Frank Walls should be sentenced to
11 death for the murder of Ann Peterson.

12 We talked about aggravation and mitigation. The judge is
13 going to tell you exactly what you may consider. There are a
14 number of factors, all of them are pretty well set out in
15 these instructions. They're not going to be difficult to
16 follow. They're sort of a value system in which you try to
17 determine whether one outweighs the other, and no one can
18 do that for you. There isn't a mathematical way of saying
19 that five is more than four. As we talked about earlier, you
20 may think one aggravating factor is enough to outweigh
21 whatever mitigation that you have found based on the evidence.
22 You may find two, you may find three, you may find as many
23 as five, because the judge is going to instruct you on five
24 aggravating factors in this case. I'm going to go through those
25 one by one, and tell you what I think about them, what I

1 remember from the evidence in the case. Mr. Sewell will do
2 the same thing, and I'm sure his feelings would be consider-
3 ably different than mine, but what we say and who we are, and
4 what you think of either one of us is not really what's at
5 issue here. I hope if I've said anything throughout the course
6 of these proceedings that's offended anyone here that you
7 won't take it out on the State of Florida, and I'm sure you
8 won't. Once these arguments are made the next thing that
9 will happen, you will hear the instructions, you'll go to the
10 jury room and you'll have a form. On that form it will tell
11 you the possibilities and there are only two possibilities.
12 You'll deliberate -- that means, discuss it among yourselves,
13 and then you'll vote, the twelve of you. That vote will
14 either be a majority for death or not, and check blank,
15 and you'll put on there if it's a recommendation of death
16 the numbers, eight to four, nine to three, ten to two,
17 twelve to zero, what your vote was as far as the death
18 penalty. You're not asked by name to say how you voted, and
19 you never will be asked by name to say how you voted. The
20 only issue is whether a majority of you felt that the death
21 penalty must be imposed. Of course, if you don't find that,
22 then another block is that you recommend life imprisonment
23 without possibility of parole for 25 years. If you check
24 that block you don't put any vote count. You just check that
25 block and bring it back in, tell Judge Barron that that's what

1 you think is an appropriate sentence in this case.

2 We talked earlier and it's not your decision as to
3 what the sentence is going to be in this case. You're going
4 to make a recommendation. You're being told it carries great
5 weight with Judge Barron as well as any other judge, but
6 he's going to make that final decision. I'm asking you to
7 recommend to him that the death penalty be imposed. A
8 number of factors, five aggravating factors that I think
9 make that the right thing to do. Before I go into those
10 five, I want to talk a little bit about the mitigating
11 evidence that you heard yesterday, and the mitigation that I'm
12 sure Mr. Sewell is going to argue about. He comes up here
13 after I do. We heard three -- two psychologists and a
14 psychiatrist testify in mitigation of Frank Walls. The
15 judge has already told you and you already know by now. You're
16 getting to be old hands at this that experts are people who are
17 allowed to give opinions. That doesn't mean you have to accept
18 any or all of their opinions. If you think what they say
19 makes sense, then you can accept whatever or all of it. That's
20 up to you. You can reject all of it. What did they say? Well,
21 Dr. Chandler testified that among other things Frank had
22 been in a lot of trouble. That was the history. He had been
23 in and out of trouble for a long time. He had an evaluation
24 and Dr. Chandler felt that he was capable of acting in
25 accordance with the law, and that he was responsible for his

1 own actions at least when he -- when he did his review.
2 Dr. Chandler said that he felt that Frank Walls had an
3 average IQ. He said that his success as far as that IQ has
4 been less than what you would expect. He hasn't done as well
5 in math, and hasn't done as well in reading, and the scores
6 didn't match up to his IQ. Based on that, although there
7 hadn't been a lot of -- there hasn't been any medical
8 testimony. He concluded that it could be a possibility that
9 he has a functioning problem, that he's just not functioning
10 the way a normal person should function. And I'll leave that
11 to you. What we do know is at that time he was capable of
12 what an average person is capable of. I'm not so sure that the
13 average person is capable of anything -- somebody of above
14 average is if he really puts his mind to it, at least I
15 always thought so. I hope so, otherwise I probably wouldn't
16 be standing here.

17 Then Dr. Valentine testified . Dr. Valentine told us that
18 he did an examination. Frank had been hospitalized for about
19 60 days, and he had to determine whether Frank would benefit
20 from any kind of medication. He gave him the medication and
21 he didn't take it. He wasn't taking it sometime later. We
22 don't exactly know when, and that basically he didn't say
23 anything too much except that he described the bipolar
24 problem that he diagnosed. He also told us though, actually,
25 he told us when -- actually told us when Mr. Sewell was

1 questioning him, the medication is not what it takes to
2 overcome a problem you have with bipolar, that's mood swings.
3 We all have mood swings. Some people have them a little
4 bit more than others, and they give that a name and they
5 call it bipolar, but it said the medication wouldn't
6 necessarily solve any problems anyway, it's just a tool.
7 That's the word he used, I think. Again, my recollection of
8 the facts is one thing. You depend on yours. Mr. Sewell may
9 have a different recollection of it. My recollection is he
10 said it was a tool, and you've got to have the will and
11 the desire to conform to society's ways, and to be productive,
12 and to be a good person, to have values and live by them,
13 then that tool of lithium can help, but you've got to have
14 that first. He said another thing that stuck in my mind
15 when he was talking about his evaluation of Frank Walls. He
16 said his wants, needs and desires exceeded his willingness
17 to conform to society's rules and regulations, and that's
18 Frank Walls. He also said that Frank threatened him. He
19 said it wasn't just a threat, it was a promise. The last
20 witness, the young Doctor Hagerott, she had a lot to say.
21 She had a lot of opinions. She saw him one time in 1992. You
22 take them for what their worth. She's a psychologist. You
23 heard all the credentials of what she does for a living. I'm
24 not even going to talk about it except to say I think -- I
25 think you can be justified in rejecting some of that

1 testimony based upon her experience and the way she testified,
2 and the demeanor that she had, the fact that she didn't have
3 Dr. Chandler's record of Frank's telling him that he didn't
4 drink much alcohol, occasionally a few -- you know, those
5 things may not seem important, but this is a professional
6 person who's supposed to be giving you an opinion in her
7 field. She's going to tell you that Frank was a blue baby, at
8 least that's her opinion. Well, you know, that's not -- you
9 can't diagnose that in 1992 for a person who is now 24 years
10 old. It may seem like he could have been, and that's okay,
11 but that's not what we're here for. We were here to hear her
12 tell us what she was sure of in her field, and she didn't do
13 that. In addition, we heard some friends of Mrs. Walls and
14 Mr. Walls testify. They knew him when he was a child, and
15 they knew him as he got older, and we saw a lot of baby
16 pictures, and -- Ladies and gentlemen, I'm not asking you not
17 to be sympathetic at all. That's the last thing in this
18 world I would ever ask you to do. You've got to be sympathetic.
19 I am, everybody who is a caring, thinking individual has got
20 to be sympathetic, but I'm going to ask you to overcome
21 that sympathy because the issue is not whether or not Frank
22 Walls was ever a child. The issue is not whether Frank Walls
23 had a mother and father. That's not what we're here to talk
24 about, and it can cloud you if you let that sympathy run away
25 with you, and I'm asking you to consider the real mitigation,

1 if you find any, and to put that sympathy aside. That's hard
2 to do. His parents came in here. Obviously, this is difficult
3 for his parents, to be here, to see him -- just to know
4 what's going on and to come here and testify, tell us what
5 he was like when he was young and so forth. That's basically
6 it. That's pretty much the mitigation. We didn't hear a lot
7 of things, at least not -- what kind of values Frank had,
8 what was his idea of right and wrong, did he got to church,
9 was he the kind of person to stand up for what's right and
10 put aside what was wrong, who were his friends, where did he
11 go at night? Nobody knows those things. At least if they
12 did, they didn't come in here and testify about it. We didn't
13 really find out about Frank Walls in July of 1987 when he committed
14 this offense. We didn't find out that, and that's the
15 mitigation.

16 The aggravation is five items that we have proved
17 beyond a reasonable doubt which we did, and we proved it in
18 our case where we proved his guilt beyond a reasonable doubt.
19 That evidence is available to you during this penalty phase.
20 I didn't see any reason to parade a bunch of photographs that
21 you've already seen, and probably will never forget the
22 rest of your life, again. However, if there's someone here
23 who feels like they'd like to see something again because of
24 what's been talked about during this argument, you have a
25 right to ask for it. If you do the judge will make it available

1 to you. For instance, you might want to listen to Frank's
2 tape recorded statement again because I'm going to talk about
3 some of those things like I talked about before. If you think
4 it would help you, you can listen to it again. I'm not going
5 to parade -- I didn't parade all that evidence in front of
6 you again, you don't need to hear it again. The five things
7 the judge is going to tell you are aggravating factors are,
8 number 1, Frank Walls committed this offense after he had
9 committed the offense of the murder of Ed Alger, and this is --
10 there's no question about this, not in your mind. You've
11 already rendered your verdict. You know that. This is a
12 double murder. That means it is permissible for you to find
13 that this is an aggravating factor in this case. You will,
14 you have to, because you found that he killed Ed Alger first.
15 He didn't kill Ann Peterson first. That's the first aggravating
16 factor. Aggravation means a lot of things to a lot of people,
17 but to me it means a reason that it's -- it's real serious.
18 Of course, just having two people dead is real serious, but
19 as I said we in the justice system don't have any magic for
20 trying to put our values down on paper and say this is what
21 you're going to look at to decide what's right and what's
22 wrong. You know, we do the best we can, and you've got to
23 follow it. That's the law. I know you can do that, but I'm
24 not telling you that everything's perfect, but it's what you've
25 got to deal with and what I've got to deal with. The second

1 factor that's been proved beyond a reasonable doubt is that
2 this crime occurred -- of Ann Peterson was committed during
3 the course of a burglary. Now, if you believe that, then
4 that's two aggravating factors. The third aggravating factor
5 is whether or not Frank Walls killed Ann Peterson for the
6 purpose of avoiding lawful arrest. If he did, you believe
7 he did then that's an aggravating factor.

8 LOVELESS: Your Honor, I don't mean to interrupt
9 Mr. Williams, and I apologize for that, but that -- this
10 statement of law is the -- not that it isn't an aggravating
11 factor, but it may be considered as an aggravating factor
12 by the court, your Honor.

13 WILLIAMS: This is argument.

14 COURT: Well, court would request counsel to indicate
15 that they may consider it as an aggravating factor.

16 WILLIAMS: Ladies and gentlemen, every one of these
17 aggravating factors I'm going to talk about are factors you may
18 consider, and you may reject, of course. You may reject that
19 Frank Walls killed Ed Alger. You may reject that Frank Walls
20 was involved in burglary, and I -- Mr. Loveless is right. I
21 shouldn't assume that you're going to believe that when you
22 may believe or you may consider the aggravating factor that
23 he was trying to avoid being arrested. Now, the basis for that
24 is of course, his own statement. Here again, this may be
25 something you may want to listen to, but in that statement

1 you heard it and you read through the transcript while it
2 was being played, and that -- it said he killed her because
3 he didn't want any witnesses. Witnesses are what cause you
4 to be caught. He'd have to face the music, and there's no
5 other reason for killing that girl lying there on the floor
6 with her head down in that pillow with her hands and her
7 ankles bound. There's no other reason. You can find that
8 that's the reason. If you do then that's another aggravating
9 factor. The fourth aggravating factor is that this crime
10 was especially heinous, atrocious or cruel, and the judge is
11 going to tell you what each one of those words mean. He's
12 going to tell you that heinous means extremely wicked,
13 shockingly evil. He's going to tell you that atrocious means
14 outrageously wicked and vile, and cruel means designed to
15 inflict a high degree of pain with utter indifference or
16 even enjoyment of the suffering of others. The kind of crime
17 intended to be included in this definition is one that is
18 consciousnessless, pitiless, and unnecessarily torturous to the
19 victim. You know, we had a witness who told us a little bit
20 about what she could remember back in July of 1987. She
21 remembered some things that I want you to think about. The
22 first time she heard shots she thought it was about 2:00 -- she
23 looked at the clock, and it was about 2:00. She got up,
24 walked around the trailer, got -- after she had gotten her
25 shorts on, checked around, stopped for a while, looked in the

1 window saw -- to see what was inside, except it was a high
2 window and all she could see was the high ceiling or high
3 wall, got back in her trailer right next door and she heard
4 additional shots and she looked at her clock. It was 2:14.
5 We're talking about 14 minutes that Ann Peterson had to
6 live through lying on that floor after she heard the shots
7 which killed Ed Alger, and in his own statement Frank Walls
8 said she asked me if Ed was all right, I told her no. I don't
9 know what happened during those 14 minutes. It's not clear
10 and no one, I guess, will ever know, but she lay there on the
11 floor knowing that Frank at least -- she knew Ed was not
12 all right, and she knew she was helpless to defend herself,
13 and she had -- she had to feel -- I think you can find she
14 had to be under an awful lot of duress, pressure, a difficult
15 time for her, and -- before she was shot twice herself
16 and killed. I think you can find that aggravating circumstance
17 because of those 14 minutes and because of what she went
18 through. I'm asking you to do that. The last -- the fifth
19 aggravating circumstance is that this was done in a cold,
20 calculated, premeditated manner without any pretense of moral
21 or legal justification. This isn't a case where two people get
22 in a fight and somebody gets killed. This isn't a case
23 where somebody goes in to rob a 7-11 and the gun goes off and
24 somebody gets killed. This isn't that kind of case. This is
25 a case where Frank Walls has already murdered one person and

1 during that time frame whatever it was, between the time he
2 killed Ed Alger and the time he killed Ann Peterson, he had
3 sufficient time to decide enough is enough, I want out, I
4 didn't mean for this to happen, let me get away from here,
5 but he didn't do that just like he came to that trailer with
6 two cars and a truck parked outside at 2:00 in the morning,
7 just like the fact that he went inside that trailer without
8 a mask on, he's got a gun and a knife, he's got two live
9 people in there, he kicks over the fan to wake them up,
10 turns on the lights and makes sure they see him. Ladies and
11 gentlemen, I believe that you can find that that's cold,
12 calculated, and I believe that it's an aggravating factor,
13 and I believe that you can find it's an aggravating factor.
14 That's what I'm asking you to do.

15 I want you to know that this is not what you would call
16 a real pleasant time for anybody. It's difficult. It's
17 difficult for everyone that's involved, and in even making a
18 recommendation about what happens to another human being.
19 Every human being has value and I believe that, but there
20 comes a time, and this is one of those times, when the
21 justice has got to be done. Each of you were selected on this
22 jury because you believe that sometimes, not all the time, but
23 sometimes justice requires the death penalty. The state has
24 proved beyond a reasonable doubt that the crime was
25 committed -- the state has proved these aggravating factors.

1 This is one of those times. Sometimes you got to do something
2 you don't really want to do, but you've got to do what you
3 think is right. You've got to put aside sympathy, and you
4 got to go into that jury room and you've got to vote your
5 real conscience. I know that's what you're going to do. Your
6 job is just about over. I hope I've done my job. I know the
7 judge has done his job, the court reporter has done hers,
8 the clerks, the bailiffs, the law enforcement officers who
9 went to such extremes to do their job, I mean, they got a
10 search warrant and investigated this case very thoroughly.
11 You've heard all the expert witnesses, and there was a lot
12 of work -- they did their job. Everybody's done their job.
13 Now, it's time for you to do your job. You told me when you
14 got on this jury that you would consider capital punishment.
15 That's what I'm asking you to do. I'm asking you to
16 consider those five aggravating factors sufficient to
17 outweigh whatever mitigation you find, and certainly the
18 age of the defendant is a mitigating factor, and I have no
19 problem with you considering that. You should, but it doesn't
20 outweigh the aggravating factors, not by a long shot.

21 You're not going to sentence Frank Walls. Judge Barron
22 is going to go through the motions on a certain given day and
23 he's going to pronounce the sentence, but Frank Walls
24 sentenced himself to death. He did it when he went into that
25 place, armed to the teeth, two live people he didn't know,

who didn't know he was coming, and he destroyed their lives. He ended them. He sentenced himself to death, and all I'm asking you to do is go in that jury room, I'm not asking you to enjoy it because I wouldn't either, but I'm asking you to do it. Go in that jury room and recommend Frank Walls be put to death. Thank you, ladies and gentlemen.

COURT: Thank you, Mr. Williams. Mr. Sewell?

SEWELL: May it please the court, Mr. Williams. Good morning, ladies and gentlemen. Permit me to visit with you at this time, and I dare say one of the most -- if not the most important decision that you'll ever make in life, and I want to thank you for your close attention this week in jury selection, in trial, to the penalty phase proceedings yesterday, the mitigation testimony that was presented. Let me say three things that we never said. We never said that Frank was not guilty of murder. We never said that. We have never said that he didn't deserve to be punished. We never said that. We have never said -- never said that Eddie Alger and Ann Peterson deserved to die. They did not. They did not. I'll tell you why we're here. The state, as they've indicated to you, they want you to vote to recommend to kill Frank Walls. That's what this is all about. Now, the judge is going to instruct you on the law. Mr. Williams has talked about aggravating circumstances that you may consider. They're limited to the ones that -- the five that he mentioned the

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA
STATE OF FLORIDA,

VS.

CASE NO.: 87-856

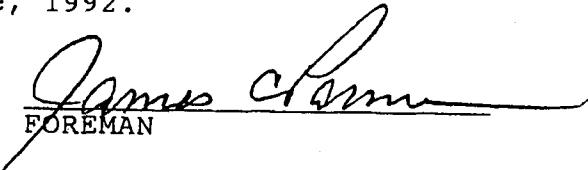
FRANK WALLS,

Defendant.

JURY RECOMMENDATION

1. A majority of the jury, by vote of 12-0, advise and recommend to the court that it impose the death penalty upon FRANK A. WALLS.
2. The jury advises and recommends to the court that it impose a sentence of life imprisonment upon FRANK A. WALLS without possibility of parole for 25 years.

Dated this 19th day of June, 1992.


FOREMAN

FILED
NEWMAN C. BRACKIN
92 JUN 22 AM 7 52
CLERK OF CIRCUIT COURT
OKALOOSA COUNTY
SHALIMAR, FL.

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

FRANK A. WALLS

Defendant.

FILED
NEWMAN C. BRACKIN
'92 JUN 22 AM 7 55
CLERK OF CIRCUIT COURT
OKALOOSA COUNTY
CHILLMAR, FL.

PENALTY PHASE INSTRUCTIONS

Ladies and gentlemen of the jury it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree of Ann Peterson. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person;
 - a. The crime of First Degree Murder of Edward Alger is a capital felony.
2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary.
3. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. To prove the aggravating circumstance of avoiding lawful arrest by elimination of a witness, when the witness is not a law enforcement officer, the proof of the intent to avoid arrest and detection must be very strong. It must be clearly shown that the dominant or only motive for murder was the elimination of the witness.

The fact that the murder victim may have been a witness who could identify the defendant as the perpetrator of a crime is not sufficient to establish this factor without proof that avoiding arrest or detection was the dominant motive for killing.

4. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to,

inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

5. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:

1. FRANK A. WALLS has no significant history of prior criminal activity;
2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
3. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance;
4. The age of the defendant at the time of the crime;
5. Any other aspect of the defendant's character or record, and any other circumstances of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that FRANK A. WALLS should be sentenced to death, your advisory sentence will be:

"A majority of the jury, by a vote of ____, advise and recommend to the court that it impose the death penalty upon FRANK A. WALLS."

On the other hand, if by six or more votes the jury determines that FRANK A. WALLS should not be sentenced to death, your advisory sentence will be:

"The jury advises and recommends to the court that it impose a sentence of life imprisonment upon FRANK A. WALLS without possibility of parole for 25 years."

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the court.

APPENDIX

H

Supreme Court of Florida

No. SC17-583

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS IN CAPITAL CASES.

[May 24, 2018]

PER CURIAM.

Previously in this case, the Court authorized for publication and use on an interim basis, on its own motion, amended existing instructions 7.11 (Preliminary Instructions in Penalty Proceedings—Capital Cases) and 7.12 (Dialogue for Polling the Jury (Death Penalty Case)), and adopted new instructions 3.12(e) (Jury Verdict Form—Death Penalty) and 7.11(a) (Final Instructions in Penalty Proceedings—Capital Cases). *In re Std. Crim. Jury Instrs. in Capital Cases*, 214 So. 3d 1236 (Fla. 2017).¹

The need for the Court to authorize for publication and use revised and new capital case jury instructions arose from the decision in *Hurst v. Florida*, 136 S. Ct.

1. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

616 (2016), wherein the United States Supreme Court held that a portion of Florida's death penalty sentencing scheme was unconstitutional because a jury was not required to find the facts necessary to impose a sentence of death. *See id.* at 619. Following remand from the Supreme Court, we held

that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.

Hurst v. State, 202 So. 3d 40, 54 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

We further held that a unanimous jury recommendation for death is required before a trial court may impose a sentence of death. *Id.* The changes to the standard criminal jury instructions were also warranted in light of chapter 2017-1, Laws of Florida, amending section 921.141, Florida Statutes (2016), which requires a jury to unanimously determine that a defendant should be sentenced to death.

Because the Court authorized the interim instructions on its own motion, we allowed sixty days in which the Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) and other interested persons could file comments. *In re Std. Crim. Jury Instrs. in Capital Cases*, 214 So. 3d at 1236-37, 1237 n.2. The Court received numerous comments and a response from the Committee proposing new amendments to the instructions and a response to the comments filed with the Court. Based upon the comments, the Committee's

response and proposals, and having heard oral argument in this case, we now further amend the instructions. The more significant amendments to the interim instructions are discussed below.

First, instruction 3.12(e) (Jury Verdict Form—Death Penalty) is amended under Section C to change the title from “Statutory Mitigating Circumstances” to “Mitigating Circumstances.” In addition, as amended, the verdict form under Section C no longer requires jurors to list the mitigating circumstances found or to provide the jury vote as to the existence of mitigating circumstances.

Next, with regard to instruction 7.11 (Preliminary Instructions in Penalty Proceedings—Capital Cases), we amend the interim instruction by renumbering it from 7.11 to 7.10; under “Give this instruction in all cases,” removing from the provision “(2) whether one or more aggravating factors exist beyond a reasonable doubt” because it is duplicative of “(1) whether each aggravating factor is proven beyond a reasonable doubt”; under “Aggravating Factors,” deleting the word “recommending” and replacing it with the phrase “a verdict of”; and adding “unanimously” to the sentence “In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating factor has been proven beyond a reasonable doubt.”

We also amend instruction 7.11(a) (Final Instructions in Penalty Proceedings—Capital Cases) by renumbering it to 7.11. Within that instruction,

we add the following sentence pertaining to the weighing process: “The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist.” In addition, we delete the portion of instruction 7.11 that directs the jury to “weigh all of the following.”

Accordingly, we authorize the capital case jury instructions for publication and use as set forth in the appendix to this opinion.² New language is indicated by underlining; deleted language is indicated by struck-through type. In authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions. The instructions as set forth in the appendix shall become effective immediately upon the release of this opinion.

We also take this opportunity to thank the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, the Florida Supreme Court’s

2. The amendments as reflected in the appendix are to the Criminal Jury Instructions as they appear on the Court’s website at www.floridasupremecourt.org/jury_instructions/instructions.shtml. We recognize that there may be minor discrepancies between the instructions as they appear on the website and the published versions of the instructions. Any discrepancies as to instructions authorized for publication and use after October 25, 2007, should be resolved by reference to the published opinion of this Court authorizing the instruction.

Criminal Steering Committee, the faculty of the Handling Capital Cases course, the Honorable James C. Hankinson, the Honorable James M. Colaw, the Florida Prosecuting Attorneys Association, the Florida Public Defender Association, the Florida Association of Criminal Defense Lawyers, the Florida Center for Capital Representation at Florida International University College of Law, and all other commenters, for their thoughtful consideration, recommendations, and insight in addressing the complicated issues presented by implementing the death penalty. This assistance has been invaluable to the Court's modifications to the interim instructions.

It is so ordered.

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

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

I concur with each part of the per curiam opinion except its decision to “no longer require[] jurors to list the mitigating circumstances found or to provide the jury vote as to the existence of mitigating circumstances” in instruction 3.12(e), Section C. Per curiam op. at 3. Of course, the per curiam does not preclude the use of special verdict forms that include all mitigating circumstances proposed with a place for the jury vote. See per curiam op. at 4 (stating that “all interested

parties” may “request[] additional or alternative instructions”). Therefore, I would strongly urge the trial courts, at the request of defendants, to utilize a verdict form that includes places for the jury’s findings on mitigating circumstances, especially in light of *Hurst*.³

By including mitigating circumstances on the standard verdict form, this Court would enhance uniformity for jury findings as to mitigating circumstances. Nevertheless, when requested by the defendant, trial courts should follow the standard verdict form previously promulgated by this Court on an interim basis, which includes a list of mitigating circumstances proposed by the defendant and a place for the jury to indicate its vote for each mitigator. *In re Std. Crim. Jury Instrs. in Capital Cases*, 214 So. 3d 1236, 1239-40 (Fla. 2017). For reference, I include in this opinion the relevant language from that form.

Federal Verdict Forms

Based on oral argument and the supplemental authority filed in this case, it is clear that at least some federal courts use special verdict forms that request the jury in capital cases to list the mitigating circumstances it found and to indicate the jury’s vote as to whether each mitigating circumstance was proven.⁴ Reviewing

3. *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

4. *See* Notice of Supp. Auth. (Fla. Mar. 8, 2018); *see also* Standard Jury Instructions (8th Cir.) at 12.22,

the supplemental authority in this case—special verdict forms from federal capital prosecutions in Florida, one of which may be accessed [here](#)—demonstrates how these findings may be useful. Thus, requiring the jury to state its findings for each mitigating circumstance is consistent with the verdict forms employed by some federal courts.

Florida Law in Light of *Hurst*

As the per curiam opinion explains, Florida’s capital sentencing scheme has substantially changed in light of the United States Supreme Court’s opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our opinion on remand in *Hurst*. *Hurst* made clear that each of the jury’s findings, including mitigation, are constitutionally significant under the Sixth Amendment to the United States Constitution and article I, section 22, of the Florida Constitution. *See Hurst*, 202 So. 3d at 44; *see also* per curiam op. at 2. Likewise, I have explained several times since *Hurst* that the penalty phase jury’s findings on mitigation are critical to the constitutional imposition of the death penalty, and this Court cannot speculate as to a jury’s findings of mitigation when reviewing a death sentence. *See, e.g., Hannon v. State*, 228 So. 3d 505, 514-19 (Fla.) (Pariente, J., dissenting), *cert. denied*, 138 S. Ct. 441 (2017); *Kaczmar v. State*, 228 So. 3d 1, 16-17 (Fla. 2017) (Pariente, J.,

<http://www.juryinstructions.ca8.uscourts.gov/sec12.pdf>; *id.* at 12.10 (jury instructions stating that the special verdict form asks but does not require the jury “to identify any mitigating factors that any one [juror] finds has been proved”).

concurring in part and dissenting in part) (joined by Justice Quince), *petition for cert. filed*, No. 17-8148 (U.S. Mar. 14, 2018); *see also Hurst*, 202 So. 3d at 44. As I did even before *Hurst*, I now urge the Court, especially in light of *Hurst*, to fully correct our standard capital verdict form to ensure the constitutional imposition of death sentences in this State.⁵

As I have explained, including the jury's findings of aggravating factors *and* mitigating circumstances “would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury.” *Lebron v. State*, 982 So. 2d 649, 671 (Fla. 2008) (Pariente, J., concurring); *see Coday v. State*, 946 So. 2d 988, 1023-25 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part). Likewise, specially concurring in *Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009), joined by now-Chief Justice Labarga, I explained that some of the most experienced trial judges in our State use special verdict forms to avoid “the constitutional concerns with the inability to receive explicit jury findings,” *id.* at

5. *See, e.g., Aguirre-Jarquin v. State*, 9 So. 3d 593, 611-13 (Fla. 2009) (Pariente, J., specially concurring); *In re Std. Jury Instrs. in Crim. Cases—Report No. 2005-2*, 22 So. 3d 17, 25-27 (Fla. 2009) (Pariente, J., specially concurring); *Lebron v. State*, 982 So. 2d 649, 671 (Fla. 2008) (Pariente, J., concurring); *Franklin v. State*, 965 So. 2d 79, 104 (Fla. 2007) (Pariente, J., specially concurring); *Coday v. State*, 946 So. 2d 988, 1023-25 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part); *Huggins v. State*, 889 So. 2d 743, 777 (Fla. 2004) (Pariente, J., dissenting).

611 (Pariente, J., specially concurring), and that “special verdict forms would assist in this Court’s review of death sentences.” *Id.* at 613.

Further, I explained in my specially concurring opinion in *In re Standard Jury Instructions in Criminal Cases—Report No. 2005-2*, 22 So. 3d 17 (Fla. 2009), joined by now-Chief Justice Labarga and former Justice Perry:

I also believe that this Court has missed an opportunity to further enhance the process of imposition of the death penalty by requiring the use of special verdict forms in the penalty phase so that the jury could have had the opportunity to record its findings on aggravators and mitigators—the essential ingredients in the ultimate decision of whether to impose the death penalty. As the Committee explained in its initial report, “the trial judge [presently] does not know how the jury considered the various aggravating and mitigating circumstances,” and *it would be “most helpful to the trial judge [in preparing the sentencing order] to know how the jury viewed the evidence presented in the penalty phase,” for this would “provide valuable assistance in deciding the weight to be given to each circumstance.”* (Emphasis added). . . .

I continue to believe that this Court has the authority to require special interrogatories and since the Court does not believe that it has that authority, I urge, as did Justice Cantero before me, that there be changes to the death penalty statute to allow for the use of special verdict forms.

Id. at 24-27 (Pariente, J., specially concurring).

Thus, even though the majority of this Court does not adopt a standard verdict form requiring trial courts to list mitigating circumstances and asking the jury to indicate its findings as to mitigating circumstances, it also does not prevent these findings. Accordingly, when requested by the defendant, I urge the trial

courts to use verdict forms that include those findings. *See* majority op. at 3. In the interest of uniformity, I urge trial courts to use the following language, which this Court promulgated after *Hurst*:⁶

Mitigating Circumstances:

We the jury find that (mitigating circumstance) was established by the greater weight of the evidence.

YES _____
NO _____

If you answered YES above, please provide the jury vote as to the existence of (mitigating circumstance).

VOTE OF ____ TO ____.

Repeat for each mitigating circumstance proposed by the defendant.

See In re Std. Crim. Jury Instrs. in Capital Cases, 214 So. 3d at 1239-40.

CONCLUSION

For all of these reasons, I would include mitigating circumstances in the standard verdict form for the penalty phase of capital cases, including the jury's vote as to each mitigating circumstance. Nevertheless, because the majority deletes these findings in the instructions approved today, I encourage defense

6. The verdict form promulgated by this Court in our prior opinion separated statutory and nonstatutory mitigating circumstances. *See In re Std. Crim. Jury Instrs. in Capital Cases*, 214 So. 3d at 1239-40. After considering the arguments in this case, I agree with the per curiam that this is no longer necessary and, therefore, have slightly revised the prior verdict form. Per Curiam op. at 3.

counsel to request and the trial courts to approve, respectively, the inclusion of these findings on the verdict form. *See per curiam op.* at 4 (stating that “all interested parties” may “request[] additional or alternative instructions”).

LABARGA, C.J., and QUINCE, J., concur.

Original Proceeding – Supreme Court Committee on Standard Jury Instructions in Criminal Cases

Judge Debra Johnes Riva, Twelfth Judicial Circuit, Sarasota, Florida, and Judge James C. Hankinson on behalf of Handling Capital Cases Faculty, Tallahassee, Florida; Howard L. “Rex” Dimmig, II, Public Defender, and Peter Mills, Assistant Public Defender, Chair, Florida Public Defender Association Death Penalty Steering Committee, Tenth Judicial Circuit, Bartow, Florida; Karen M. Gottlieb on behalf of Florida Center for Capital Representation at FIU College of Law, Miami, Florida, and Billy H. Nolas, Chief, Capital Habeas Unit, Federal Public Defender, Northern District, Tallahassee, Florida, Sonya Rudenstine, Gainesville, Florida, Luke Newman, Tallahassee, Florida, and William R. Ponall of Ponall Law on behalf of Florida Association of Criminal Defense Lawyers, Maitland, Florida; Robert R. Berry, Tallahassee, Florida; Penny H. Brill, Assistant State Attorney, Eleventh Judicial Circuit, Miami, Florida, and Arthur I. Jacobs of Jacobs Scholz & Associates, LLC on behalf of Florida Prosecuting Attorneys Association, Fernandina Beach, Florida; Judge F. Rand Wallis, Chair, and Judge James Colaw, Supreme Court Committee on Standard Jury Instructions in Criminal Cases, Daytona Beach, Florida; and Bart Schneider, Staff Liaison, Office of the State Courts Administrator, Tallahassee, Florida,

Responding with comments

APPENDIX

3.12(e) JURY VERDICT FORM—DEATH PENALTY

We the jury find as follows as to (Defendant) in this case:

A. Aggravating Factors as to Count ____:

We the jury unanimously find that the State has established beyond a reasonable doubt the existence of (aggravating factor).

YES _____

NO _____

Repeat this step for each statutory aggravating factor submitted to the jury.

If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered NO to every aggravating factor listed, do not proceed to Section B; (Defendant) is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.

B. Sufficiency of the Aggravating Factors as to Count ____:

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find the aggravating factors are sufficient to warrant a possible sentence of death.

YES _____

NO _____

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) will be sentenced to life in prison without the possibility of parole.

C. ~~Statutory~~ Mitigating Circumstances:

~~We the jury~~ One or more individual jurors find that ~~(statutory one or more mitigating circumstances)~~ was established by the greater weight of the evidence.

YES _____

NO _____

~~If you answered YES above, please provide the jury vote as to the existence of (statutory mitigating circumstance).~~

~~_____ VOTE OF _____ TO _____.~~

~~Repeat for each statutory mitigating circumstance.~~

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count ____.

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count _____.

YES _____

NO _____

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) will be sentenced to life in prison without the possibility of parole.

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating [factor] [factors] [is] [are] sufficient to warrant a sentence of death (Section B), and the aggravating [factor] [factors] outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES _____

NO _____

~~If NO, our vote to impose a sentence of life is _____ to _____.~~

If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.

Dated this _____ day of _____, 20__, in _____ County, Florida.

(Signature of foreperson) / Juror identification number

Comment

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018.

7.140 PRELIMINARY INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES § 921.141, Fla. Stat.

The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

This instruction is to be given immediately before the opening statements in the penalty phase of a death penalty case.

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. ~~Give bracketed language if the case has been remanded for a new penalty proceeding. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996).~~ In addition, give the jury other appropriate general instructions.

1. a. **Members of the jury, the defendant has been found guilty of _____ count[s] of Murder in the First Degree in a previous proceeding. The only issue before you is to determine the appropriate sentence. The punishment for this crime is either life imprisonment without the possibility of parole or death.**

Give 1b at the beginning of penalty proceedings before the jury that found the defendant guilty.

- b. **Members of the jury, you have found the defendant guilty of _____ count[s] of Murder in the First Degree. The punishment for this crime is either life imprisonment without the possibility of parole or death.**

~~For murders committed before May 25, 1994, the following paragraph should be modified to comply with the statute in effect at the time the crime was committed. If the jury inquires whether the defendant will receive credit for time served against a sentence of life without possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently. See Green v. State, 907 So. 2d 489, 496 (Fla. 2005).~~

~~2. The punishment for this crime is either life imprisonment without the possibility of parole or death.~~

Give this instruction in all cases.

The attorneys will now have an opportunity, if they wish, to make an opening statement. The opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the penalty phase of this trial. What the lawyers say during opening statements is not evidence, and you are not to consider it as such. After the attorneys have had the opportunity to present their opening statements, the State and the defendant may present evidence relative to the nature of the crime and the defendant's character, background, or life. You are instructed that this evidence [, along with the evidence that you heard during the guilt phase of this trial,] is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proven beyond a reasonable doubt; (2) ~~whether one or more aggravating factors exist beyond a reasonable doubt;~~ (3) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (4) ~~whether mitigating~~ circumstances are proven by the greater weight of the evidence; (5) ~~whether the aggravating factors outweigh the mitigating circumstances;~~ and (6) ~~whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.~~ At the conclusion of the evidence and after argument of counsel, you will be instructed on the law that will guide your deliberations.

Aggravating Factors:

An aggravating factor is a standard to guide the jury in making the choice between recommending a verdict of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance that increases the gravity of a crime or the harm to a victim.

You must unanimously agree that each aggravating factor was proven beyond a reasonable doubt before it may be considered by you in arriving at

your final verdict. In order to consider the death penalty as a possible penalty, you must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt.

The State has the burden to prove each aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating factor has not been proved beyond ~~every~~a reasonable doubt and you must not consider it in providing your verdict on the appropriate sentence to the court.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating factor does exist.

Before moving on to the mitigating circumstances, you must determine that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factor[s] [is] [are] sufficient to impose death, do not move on to consider the mitigating circumstances.

Mitigating Circumstances:

Should you find sufficient aggravating factors do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating factors that you unanimously find to have been proven beyond a reasonable doubt outweigh the mitigating circumstances that you find to have been established. Unlike aggravating factors, you do not need to unanimously agree that a mitigating circumstance has been established. Rather, whether a mitigating circumstance has been established is an individual judgment by each juror.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything ~~in the life of the defendant~~ which might indicate that the death penalty is not appropriate for the defendant. In other words, a

mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proven by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Comments

The court may instruct jurors regarding victim impact evidence or other sections of the final instructions (#7.11) as part of the preliminary instruction.

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So. 2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], 1998 [723 So. 2d 123], 2009 [22 So. 3d 17], 2014 [146 So. 3d 1110], and 2017 [214 So. 3d 1236], and 2018.

7.11(a) FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES § 921.141, Fla. Stat.

This instruction should be given after the closing arguments in the penalty phase of a death penalty trial. The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

In making your decision, you must first unanimously determine whether the aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

Aggravating factors. § 921.141(6), Fla. Stat.

The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

- 1. (Defendant) was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**
- 2. (Defendant) was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

Give 2a or 2b as applicable.

- a. The crime of (previous crime) is a capital felony.**
- b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.**
- 3. (Defendant) knowingly created a great risk of death to many persons.**
- 4. The First Degree Murder was committed while (defendant) was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].

[sexual battery].

[aggravated child abuse].

[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].

[arson].
[burglary].
[kidnapping].
[aircraft piracy].
[unlawful throwing, placing or discharging of a destructive device or bomb].

~~Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.~~

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
6. The First Degree Murder was committed for financial gain.
7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
8. The First Degree Murder was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

- 10. (Decedent) was a law enforcement officer engaged in the performance of [his] [her] official duties.**
- 11. (Decedent) was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to (decendent’s) official capacity.**
- 12. (Decedent) was a person less than 12 years of age.**
- 13. (Decedent) was particularly vulnerable due to advanced age or disability, or because (defendant) stood in a position of familial or custodial authority over (decendent).**

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

- 14. The First Degree Murder was committed by a criminal street gang member.**

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],
[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Pursuant to Florida law, the aggravating factors of (insert aggravating factor) and (insert aggravating factor) are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of (insert aggravating factor) and (insert aggravating factor) have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.

Victim-impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating factor.

Give in all cases.

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond ~~every~~a reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that [the] [each] presented aggravating factor exists. You will be provided a form to make this finding [as to each alleged aggravating factor] and you should indicate whether or not you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that [one or more] [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Mitigating circumstances. § 921.141(7), Fla. Stat.

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[(s)] [is] [are] sufficient to impose a

sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance is anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything in the life of the defendant which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

Among the mitigating circumstances you may consider are:

Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) has no significant history of prior criminal activity.

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.

2. The First Degree Murder was committed while (defendant) was under the influence of extreme mental or emotional disturbance.

3. (Decedent) was a participant in (defendant's) conduct or consented to the act.

4. (Defendant) was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.

5. (Defendant) acted under extreme duress or under the substantial domination of another person.

6. The capacity of (defendant) to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.

7. (Defendant's) age at the time of the crime.

The judge should also instruct on any additional mitigating circumstances as requested.

8. The existence of any other factors in (defendant's) character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.

~~It is the defendant's burden to prove that mitigating circumstances exist. As explained before these proceedings, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case. Further, any juror may consider a mitigating circumstance found by another juror, even if he or she did not find that factor to be mitigating.~~

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings. ~~You will now engage in a weighing process.~~

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial

~~gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. *Castro v. State*, 597 So. 2d 259 (Fla. 1992).~~

~~Pursuant to Florida law, the aggravating factors of (insert aggravating factor) and (insert aggravating factor) are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of (insert aggravating factor) and (insert aggravating factor) have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor during the weighing process that I am about to explain to you.~~

~~You must weigh all of the following:~~

- ~~a. Whether the aggravating factor[s] found to exist [is] [are] sufficient to justify the death penalty,~~
- ~~b. Whether the aggravating factor[s] outweigh[s] any mitigating circumstance[s] found to exist, and~~
- ~~c. Based on all of the considerations pursuant to these instructions, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.~~

The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. -The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists

must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, and your finding that the aggravating factor[~~(s)~~] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision if to impose a sentence of death must be unanimous.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.

Weighing the evidence.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

- 1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?**
- 2. Did the witness seem to have an accurate memory?**
- 3. Was the witness honest and straightforward in answering the attorneys' questions?**
- 4. Did the witness have some interest in how the case should be decided?**

- 5. Did the witness's testimony agree with the other testimony and other evidence in the case?**

Give as applicable.

- 6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?**
- 7. Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?**
- 8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?**
- 9. Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?**
- 10. Does the witness have a general reputation for [dishonesty] [truthfulness]?**

Law enforcement witness.

The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.

Expert witnesses.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Accomplices and Informants.

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.

Child witness.

You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

Give only if the defendant testified.

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

Witness talked to lawyer.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.

Give in all cases.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Give only if the defendant did not testify.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

Rules for deliberation.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

- 1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.**
- 2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.**
- 3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.**
- 4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.**

Give #5 if applicable.

- 5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.**
- 6. Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias, ~~or sympathy~~. Your decisions must be based on the evidence and the law contained in these instructions.**

~~Victim-impact evidence.~~

~~—— You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating factor. Your decisions must be based on the aggravating factor[s], the mitigating circumstance[s], and the weighing process upon which you have been instructed.~~

Submitting case to jurors.

In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these

instructions, the appropriate form[s] should be signed and dated by your foreperson.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Give if judge has allowed jurors to keep their electronic devices during the penalty phase.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].

Give if applicable.

During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.

Give a or b as appropriate.

- a. **The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.**
- b. **If you wish to see an[y] exhibit[s], please request that in writing.**

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have

questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

Comment

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018.

7.12 DIALOGUE FOR POLLING THE JURY (DEATH PENALTY CASE)

Members of the jury, we are going to ask each of you individually about the verdict[s] that you have just heard. The question[s] pertain to whether the verdict[s], as read by the clerk, [was] [were] correctly stated.

The following question is to be asked of each juror if the verdict is for the death penalty:

Do you, [(name of juror)] [juror number (number of juror)], agree that each of the findings in the verdict form is yours?

The following question is to be asked of each juror if the verdict is for a life sentence:

Do you, [(name of juror)] [juror number (number of juror)], agree that at least one member of the jury voted for a sentence of life imprisonment without the possibility of parole?

Comment

This instruction was adopted in 1981 and was amended in 1997, ~~and~~ 2017 [214 So. 3d 1236], and 2018.