No. SC17-1073

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MILTON DAILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

---

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

JULISSA R. FONTÁN*
FLORIDA BAR NUMBER 0032744

CHELSEA RAE SHIRLEY
FLORIDA BAR NUMBER 112901

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Appendix A

247 So.3d 390
Supreme Court of Florida.

James Milton DAILEY, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1073
|
[June 26, 2018]

Synopsis

Background: Defendant sought collateral relief after his death sentence, which was initially reversed on appeal, 594 So.2d 254, was affirmed on appeal after imposed on remand, 659 So.2d 246. The Circuit Court, Pinellas County, No. 521985CF007084XXXXNO, Frank Quesada, J., denied the motion. Defendant appealed.

The Supreme Court held that defendant was not entitled to collateral relief under *Hurst v. State*, 202 So.3d 40.

Affirmed.

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

Canady, J., concurred in result.

An Appeal from the Circuit Court in and for Pinellas County, Frank Quesada, Judge—Case No. 521985CF007084XXXXNO

Attorneys and Law Firms

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Chelsea Rae Shirley, Maria E. DeLiberato, and Julissa R. Fontán, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Christina Z. Pacheco, Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

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

Dailey's 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). Dailey responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), should not be dispositive in this case.

After reviewing Dailey's response to the order to show cause, as well as the State's arguments in reply, we conclude that Dailey is not entitled to relief. Dailey was sentenced to death following a jury's unanimous recommendation for death. *Dailey v. State*, 594 So.2d 254, 256 (Fla. 1991). On appeal, this Court reversed Dailey's death sentence and "remand[ed] for resentencing before the trial judge." *Id.* at 259. On remand, the trial court again sentenced Dailey to death, and Dailey's sentence of ***391** death became final in 1996. *Dailey v. State*, 659 So.2d 246, 247 (Fla. 1995), *cert. denied*, 516 U.S. 1095, 116 S.Ct. 819, 133 L.Ed.2d 763 (1996). [1] Thus, *Hurst* does not apply retroactively to Dailey's sentence of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Dailey's motion.

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

LABARGA, C.J., and LEWIS, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

CANADY, J., concurs in result.

QUINCE, J., recused.

PARIENTE, J., concurring in result.

For reasons I have explained numerous times, despite this Court's precedent, I would apply *Hurst* [2] retroactively to Dailey's sentence of death. *See Hitchcock v. State*, 226 So.3d 216, 220–23 (Fla.) (Pariente, J., dissenting), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017); *Asay v. State* (*Asay V*), 210 So. 3d 1, 32–37 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, —— U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017). Applying *Hurst* to Dailey's case, although the jury unanimously recommended death, because this Court struck two aggravators on direct appeal, the *Hurst* error in Dailey's case was not harmless beyond a reasonable doubt. *Dailey v. State*, 594 So.2d 254, 259 (Fla. 1991). In fact, relying on its arbitrary retroactivity framework, this Court turns a blind eye to the quintessential *Hurst* error—a defendant, without waiver, sentenced to death by a trial judge alone without a jury's reliable, unanimous recommendation for death. *See Dailey v. State*, 659 So.2d 246, 247 (Fla. 1995), *cert. denied*, 516 U.S. 1095, 116 S.Ct. 819, 133 L.Ed.2d 763 (1996); *see also Davis v. State*, 207 So.3d 142, 173–75 (Fla 2016); *Hurst*, 202 So.3d at 44.

In 1991, after Dailey's penalty phase before a jury, this Court determined that the trial court made several errors in sentencing Dailey to death. *See generally Dailey*, 594 So.2d 254. In pertinent part, this Court determined that the evidence did not establish two aggravating factors that the trial court considered: (1) "that the murder was committed to prevent a lawful arrest," and (2) "that the murder was committed in a cold, calculated, and premeditated manner." *Id.* at 259. Further, this Court determined that the trial court erred in "recogniz[ing] the presence of numerous mitigating circumstances, but then accord[ing] them no weight at all." *Id.* Accordingly, this Court reversed Dailey's sentence of death and remanded for "resentencing before the trial judge." *Id.* On remand, the trial judge, alone, sentenced Dailey to death. *Dailey*, 659 So.2d at 247.

Of course, this Court's opinion in *Hurst* made clear that the jury is critical to the constitutional imposition of the death penalty. *See* 202 So.3d at 44, 60. Further, I explained in ***392** *Middleton v. State*, 42 Fla. L. Weekly S637, 2017 WL 2374697 (Fla. June 1, 2017), how stricken aggravating factors gravely undermine the critical reliability of a jury's unanimous recommendation for death in the context of a *Hurst* harmless error analysis. *Id.* at *1–2 (Pariente, J., dissenting).

In this case, it is clear that Dailey's penalty phase jury considered invalid aggravating factors in recommending a sentence of death. Therefore, if *Hurst* applied to Dailey's case, this Court could not rely on the jury's unanimous recommendation for death to determine that the *Hurst* error was harmless beyond a reasonable doubt. Even more, when this Court remanded for resentencing, Dailey's sentence of death was reviewed by a single trial judge alone. Thus, as a result of this Court's arbitrary framework for determining the retroactivity of *Hurst*, Dailey remains under an unconstitutionally unreliable sentence of death.

All Citations

247 So.3d 390, 43 Fla. L. Weekly S272

Footnotes

1 In affirming Dailey's death sentence after resentencing, we affirmed the death sentence, rejecting Dailey's arguments that his penalty phase jury's "recommendation of death was invalid and he was entitled to an entire new penalty phase trial before a new jury." *Dailey*, 659 So.2d at 247–48.

2 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

Appendix B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC85-07084CFANO
UCN: 521985CF007084XXXXNO
DIV.: K

JAMES DAILEY,
Person ID: 416094, Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE; ORDER DENYING DEFENDANT'S MOTION TO HOLD SUCCESSIVE MOTION IN ABEYANCE; ORDER DISMISSING STATE'S MOTION TO STRIKE AFFIDAVIT; DIRECTIONS TO CLERK

THIS CAUSE came before the Court upon Defendant's Successive Motion to Vacate Death Sentence, filed January 9, 2017, pursuant to Florida Rule of Criminal Procedure 3.851, the State's Answer, filed January 27, 2017, Defendant's Motion to Hold Mr. Dailey's Successive Postconviction Motion in Abeyance, filed March 21, 2017, the State's Response, filed March 21, 2017, Defendant's Affidavit of the Honorable Henry Andringa, filed March 21, 2017, and the State's Motion to Strike Affidavit, filed March 22, 2017. On February 20, 2017, the Court held a case management conference and heard the parties' legal arguments. Having considered the pleadings, the oral arguments of the parties, the record, and the applicable law, the Court finds as follows:

PROCEDURAL HISTORY

On June 27, 1987, a jury found Defendant guilty of the first-degree murder of fourteen year old Shelly Boggio. After a penalty phase, the jury unanimously recommended death. On August 7, 1987, the presiding court sentenced Defendant to death. The Florida Supreme Court affirmed Defendant's conviction on direct appeal, but struck two of the five aggravating circumstances and remanded for resentencing. Dailey v. State, 594 So. 2d 254 (Fla. 1991).[1] On January 21, 1994, the trial court resentenced Defendant to death. Defendant's sentence was affirmed on appeal. Dailey v. State, 659 So. 2d 246 (Fla. 1995). The mandate issued on or about September 22, 1995. On or about November 21, 1995, the United States Supreme Court denied Defendant's petition for writ of certiorari. Dailey v. Florida, 516 U.S. 1095 (1996). Defendant

[1] The evidence introduced at the guilt and penalty phases of trial is summarized in the appellate opinion.

subsequently filed collateral motions for relief in state and federal court, each of which was dismissed or denied. Dailey v. State, 965 So. 2d 38 (Fla. 2007); Dailey v. Sec'y, Fla. Dep't of Corr., 2008 WL 4470016 (M.D. Fla. Sept. 30, 2008); Dailey v. Sec'y, Fla. Dep't of Corr., 2011 WL 1230812 (M.D. Fla. Apr. 1, 2011), amended in part, vacated in part, 2012 WL 1069224, at *1 (M.D. Fla. Mar. 29, 2012) (amending opinion to include the denial of an additional claim of ineffective assistance of counsel and denying motion for certificate of appealability to the Eleventh Circuit Court of Appeals).

On January 9, 2017, Defendant filed the instant successive motion to vacate death sentence, alleging that he is entitled to relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016), petition for cert. filed, No. 16-998 (Feb. 13, 2017).[2] On January 27, 2017, the State timely filed its answer. On February 10, 2017, Defendant filed a motion for change of venue. The same day, the State filed a response to Defendant's motion for change of venue, indicating that it had no position on the motion.

On February 20, 2017, the Court heard the parties' legal arguments at a case management conference in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(B). At the hearing, the Court denied Defendant's motion for change of venue, but granted his request for thirty days' leave to supplement the record with an affidavit from his original trial counsel, current Sixth Judicial Circuit Senior Judge Henry Andringa.[3] The Court reserved ruling on the motion to vacate death sentence until the time granted for Defendant to supplement the record expired. On March 21, 2017, Defendant filed a motion to hold his Rule 3.851 motion in abeyance pending the resolution of the petition for certiorari in Hurst v. State, and filed an affidavit from Judge Andringa. On March 22, 2017, the State filed a response to Defendant's request to hold the motion in abeyance and a motion to strike Judge Andringa's affidavit.

DEFENDANT'S MOTION TO HOLD SUCCESSIVE MOTION TO VACATE DEATH SENTENCE IN ABEYANCE

Defendant requests that this Court hold his motion in abeyance because the State of Florida has filed a petition for writ of certiorari in the U.S. Supreme Court to review the Florida Supreme Court's decision in Hurst v. State. The State argues that holding the motion in abeyance would needlessly delay and prolong these proceedings. The Court, having considered the facts

[2] On March 21, 2017, Defendant filed an amended 3.851 motion, which corrects a typographical error and does not raise any substantive amendments to his original motion.
[3] The Court subsequently entered a written order denying Defendant's motion for change of venue.

and circumstances of this case, and in recognition if its duty to address capital postconviction cases in a timely and efficient manner, finds that delaying ruling on this motion is not in the interest of the administration of justice. See Fla. R. Jud. Admin. 2.215(g). Defendant's motion is therefore denied and the Court will rule on the merits of his successive motion to vacate death sentence.

DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

A motion for collateral relief from a death sentence must be filed within one year after the judgment and sentence becomes final. See Fla. R. Crim. P. 3.851(d)(1). Pursuant to Rule 3.851(d)(1), a judgment and sentence becomes final upon expiration of the time permitted to file a petition for writ of certiorari with the United States Supreme Court seeking review of the Florida Supreme Court's decision affirming a judgment and sentence of death or, if filed, upon the U.S. Supreme Court's disposition of the petition. In the instant case, Defendant's judgment and sentence became final on November 21, 1995, when the Supreme Court of the United States denied Defendant's petition for writ of certiorari to review the Florida Supreme Court's opinion affirming his sentence. Unless Defendant can establish that the instant motion falls under an enumerated exception to the time limit, it must be denied as untimely. To that end, Defendant alleges that his motion is timely pursuant to the exception enumerated in Rule 3.851(d)(2), which permits an otherwise untimely claim if it is based on a fundamental constitutional right that has been held to apply retroactively. See Fla. R. Crim. P. 3.851(d)(2).

On January 12, 2016, the United States Supreme Court held that Florida's capital sentencing scheme, in which the judge makes the findings required to impose the death penalty instead of the jury, violates the Sixth Amendment right to jury trial pursuant to Ring v. Arizona, 536 U.S. 584 (2002). See Hurst v. Florida, 136 S. Ct. at 621–22. On remand, the Florida Supreme Court held that Florida's death penalty law violates the Sixth Amendment, which requires that the jury unanimously find the existence of the aggravating factors beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. See Hurst v. State, 202 So. 3d at 53. The Florida Supreme Court further held that Florida's death penalty law violates the Eighth Amendment, which requires that the jury's recommended sentence of death be unanimous in order for the trial court to impose death. See id.

In the instant motion, Defendant claims that Hurst v. State applies retroactively to his

case under state and federal law and argues that he is entitled to a new penalty phase. First, Defendant contends that Hurst v. State applies retroactively under state law doctrines of fundamental fairness and Witt[4] retroactivity. Second, Defendant claims that Hurst v. State is retroactive under federal law pursuant to Montgomery v. Louisiana, 136 S. Ct. 718, 731–32 (2016). Third, Defendant claims that the Hurst error in this case is not harmless beyond a reasonable doubt because the Florida Supreme Court struck two of the aggravating factors and, upon remand, a new penalty phase jury was not empaneled to decide whether the one remaining aggravating factor was sufficient to impose the death penalty. Finally, Defendant contends that he is entitled to have all of his prior Brady,[5] Giglio,[6] and Strickland[7] claims reconsidered in light of the changes to the law.

In its answer, the State contends that Defendant's motion should be summarily denied as untimely. First, the State argues that Defendant is not entitled to relief under state law because the Florida Supreme Court has established a bright-line rule that refuses retroactive relief to defendants whose sentences were final before Ring was issued in 2002. See Asay v. State, 210 So. 3d 1, 22 (Fla. 2016). Second, the State maintains that Defendant has no federal right to retroactive application of either Hurst opinion because they establish procedural, not substantive, changes in the law. Third, the State submits that, even if Hurst applies retroactively to Defendant, any Hurst error is harmless beyond a reasonable doubt because the jury unanimously recommended the death penalty, notwithstanding the fact that a new penalty-phase jury was not empaneled upon remand. Finally, the State contends that Defendant's prior Brady, Giglio, and Strickland claims are procedurally barred because those issues have already been litigated and affirmed on appeal.

For the reasons more fully set forth below, this Court is persuaded by the State's arguments and finds that Defendant's motion is untimely because there is no state or federal opinion holding that Defendant is entitled to retroactive application of a newly-established constitutional right. To the contrary, the Florida Supreme Court has adopted a bright-line rule foreclosing retroactive relief to defendants whose sentences were final before Ring was issued. Compare Asay v. State, 210 So. 3d at 22 (Fla. 2016) (holding that the Hurst v. State does not

[4] Witt v. State, 387 So. 2d 922 (Fla. 1980).
[5] Brady v. Maryland, 73 U.S. 83 (1963).
[6] Giglio v. United States, 405 U.S. 150 (1972).
[7] Strickland v. Washington, 466 U.S. 668 (1984).

apply retroactively to sentences that were final before Ring was issued) with Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016) (holding that Hurst v. State applies retroactively to sentences that became final after Ring was issued); see also Bogle v. State, --- So. 3d --- , 2017 WL 526507, at *16 (Fla. Feb. 9, 2017); Lambrix v. State, --- So. 3d ---, 2017 WL 931105, at *8 (Fla. Mar. 9, 2017).

(a) Retroactivity Under State Law:

Defendant argues that fundamental fairness requires retroactive relief in his case because he raised Sixth and Eighth Amendment challenges to Florida's capital sentencing scheme in pretrial and postconviction proceedings, before Ring was decided. Defendant draws support for this argument from the Mosley Court's discussion of James v. State, 615 So. 2d 668 (Fla. 1993) (applying opinion finding capital jury instruction unconstitutional retroactively to defendants who challenged the instruction at trial or on appeal). The James opinion was founded upon "fundamental fairness," rather than a Witt retroactivity analysis. See id. at 669. The Mosley Court concluded that because Mosley, like James, raised a Ring claim at his first opportunity and was "rejected at every turn," considerations of fundamental fairness warranted retroactive application in addition to a Witt analysis. See Mosley, 209 So. 3d at 1275. Defendant argues that he is similarly situated because he challenged the constitutionality of Florida's sentencing scheme by raising a Ring-type claim at his first opportunity.

Defendant's argument, however, ignores that the fact that the Mosley Court addressed retroactivity only after explaining that Asay foreclosed retroactive relief to capital defendants whose sentences were final before Ring, but left open the question of retroactive application to "postconviction defendants, like Mosley, *whose sentences became final after* [Ring]." Id. at 1276. (emphasis added). The binding majority opinion in Asay implicitly rejected Defendant's contention that barring relief to defendants who had the foresight to raise constitutional challenges to Florida's death penalty scheme before Ring is fundamentally unfair. See Asay, 210 So. 3d at 30 (Lewis, J., concurring) ("[T]he majority opinion has incorrectly limited the retroactive application of Hurst by barring relief to even those defendants who, prior to Ring, had properly asserted, presented, and preserved challenges to the lack of jury fact finding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue."). Thus, Defendant is not entitled to retroactive application of Hurst based on fundamental fairness.

Defendant also contends that he is entitled to retroactive relief under the Witt retroactivity analysis and seems to claim that the Witt analysis in Asay does not foreclose his claim because it addressed only the Hurst v. Florida opinion, not Hurst v. State. The Court's retroactivity analysis in Asay, however, is explicitly premised upon Hurst v. State's interpretation of Hurst v. Florida. See Asay, 210 So. 3d at 11 (explaining that the import of Hurst v. Florida to Florida's capital sentencing scheme is set forth by Hurst v. State, including the portion of the holding requiring a unanimous jury verdict to impose death). Even if Defendant is correct that Asay does not foreclose a Witt retroactivity analysis to his case, this Court is still compelled to deny Defendant's motion because his argument necessarily concedes that there is no case law announcing a fundamental constitutional right that applies retroactively.

(b) Retroactivity Under Federal Law:

Defendant contends that he is entitled to retroactive relief under federal law because both Hurst opinions herald substantive rules of constitutional law, which require state courts to grant retroactive relief in collateral proceedings. See Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). Defendant contends that Hurst v. State, in particular, announced substantive changes rooted in the Sixth and Eighth Amendments by requiring that all findings necessary before the court can impose death, including the final recommendation of death, must be found unanimously by the jury. Defendant argues that these changes are substantive and Florida courts must give them retroactive effect. Defendant also contends that the Florida Supreme Court's partial retroactivity scheme is unconstitutionally arbitrary and capricious under the Eighth Amendment and violates Defendant's due process rights. He argues that "partial retroactivity" has no basis in state or federal jurisprudence and, when applied, will lead to disparate results for similarly-situated defendants. See Asay, 210 So. 3d at 37 (Perry, J., dissenting) ("In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons.").

Defendant's partial retroactivity argument, while interesting, is unsupported by any existing law and deviates from the crux of the issue before this Court, which is whether Defendant can establish an exception to the time bar under Florida Rule of Criminal Procedure 3.851. There is no authority holding either Hurst opinion retroactive to Defendant under federal

law. To the contrary, there is federal law supporting the State's position that, where an evolution in death penalty jurisprudence modifies the procedure required to impose the death penalty and does not bar the imposition of the death penalty to a category of persons, the change is procedural in nature and state courts are not required to give such changes retroactive effect. See Schriro v. Summerlin, 542 U.S. 348, 354–55 (2004) (holding that the Supreme Court's opinion in Ring set forth a procedural, rather than substantive, rule and therefore did not apply retroactively to cases already final on direct review); see also Montgomery, 136 S. Ct. at 729–30 (explaining that "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," and "procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability.") (quoting id. at 353) (internal quotations omitted). Therefore, the Court finds that Defendant does not have a federal right to retroactive relief.

(c) Harmless Error:

Defendant claims that he is entitled to a new penalty phase because any Hurst error is not harmless beyond a reasonable doubt. Defendant contends that the jury's unanimous recommendation is invalid because the Court misadvised the jury that their recommendation was merely advisory, and that a new jury should have been impaneled upon remand and resentencing. Having found that Defendant is not entitled to retroactive application of either Hurst opinion, the Court need not address whether the Hurst error in this case was harmless. The Court observes, however, that the Florida Supreme Court has yet to find Hurst error harmful where the jury's death recommendation was unanimous. See Johnson v. State, 205 So. 3d 1285 (Fla. 2016); see also McGirth v. State, 209 So. 3d 1146 (Fla. 2017); Kopsho v. State, 209 So. 3d 568 (Fla. 2017).

(d) Prior Postconviction Claims:

Defendant contends that the court should reconsider all of his prior Brady, Giglio, and Strickland because the Court's previous analysis failed to consider prejudice in the context of the new death penalty law requiring a unanimous jury verdict to impose death. In support of this argument, Defendant submits an affidavit from Judge Henry Andringa, who essentially attests that his trial strategy would have been different if he had known that Hurst and its progeny would significantly alter Florida's death penalty scheme. There is no legal basis, however, for the Court to reconsider Defendant's previous postconviction claims. Judge Andringa's affidavit

is irrelevant to the legal issue at the crux of this motion, which is whether Defendant can establish that the law establishes a new constitutional right that is retroactively applicable to him. The Court, therefore, has not considered the affidavit in its analysis of Defendant's motion.

STATE'S MOTION TO STRIKE AFFIDAVIT

The State moves to strike Judge Andringa's affidavit because it is irrelevant to Defendant's legal claim. Having determined that the Court will not consider the contents of the affidavit, the State's motion is dismissed as moot.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion to Hold Mr. Dailey's Successive Postconviction Motion in Abeyance" is **HEREBY DENIED.** It is further

ORDERED AND ADJUDGED that Defendant's Successive Motion to Vacate Death Sentence is **HEREBY DENIED.** It is further

ORDERED AND ADJUDGED that the State's "Motion to Strike Affidavit" is **HEREBY DISMISSED.**

DEFENDANT IS HEREBY NOTIFIED that this is a **FINAL ORDER**, and he has thirty (30) days from the date of this order in which to file an appeal, should he choose to do so.

THE CLERK IS HEREBY DIRECTED, in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(F), to promptly serve a copy of this order upon the State, the Attorney General, and counsel for Defendant with a certificate of service.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 12th day of April, 2017. A true and correct copy of this order has been furnished to the parties listed below.

Frank Quesada, Circuit Judge

cc: Office of the State Attorney / Kristi Aussner, ASA

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Appendix C

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____/

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

Defendant James Dailey, 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, and the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, --- So.3d --- 2016 WL 6036982 (Fla.), *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.

Mr. Daily was tried by a jury and found guilty on June 27, 1987 of first degree murder. The jury recommended a sentence of death for the first degree murder conviction on June 30, 1987 by a vote of twelve to zero. The trial court sentenced Mr. Dailey to death on August 7, 1987. On November 14, 1991, the Florida Supreme Court affirmed the conviction, but vacated Mr. Dailey's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstance of "cold, calculated and premeditated" and the murder was committed to avoid arrest. The trial court also improperly failed to assign any weight to numerous mitigating circumstances, and erroneously relied on evidence from a different trial which was not introduced in the guilt or penalty phase. *Dailey v. State*, 594 So.2d 254 (Fla. 1991). On remand, the trial court, *without empaneling a new jury*, again sentenced Mr. Dailey to death and the Florida Supreme Court affirmed. *Dailey v. State*, 659 So.2d 246 (Fla. 1995). To be clear, Mr. Dailey did not waive his right to a jury, but specifically filed a motion to empanel a new jury and hold a new penalty phase. This motion was denied by the trial court and on appeal by the Florida Supreme Court.

Dailey v. Florida, 659 So. 2d 246 (Fla. 1995). The Supreme Court of the United States denied certiorari on January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

On March 28, 1997, Mr. Dailey filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. He filed amended motions on April 11, 1997, and November 12, 1999. The circuit court denied the Motion after a limited evidentiary hearing. Mr. Dailey appealed and filed a petition for state habeas relief to the Florida Supreme Court. In his state habeas, Mr. Dailey argued that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). *Dailey v. State*, 965 So. 2d 38, 48-49 (Fla. 2007). The Florida Supreme Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Id.*

Thereafter, Mr. Dailey filed a timely Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. *Dailey v. Secretary Department of Corrections*, District Court Case No. 07-CV-1897-T-27MAP. The District Court denied his habeas petition April 1, 2011. He filed a timely Notice of Appeal and Certificate of Appealability before the United States Court of Appeals for the Eleventh Circuit. (Case No. 12-12222-P), which was subsequently denied. The United States Supreme Court denied certiorari on April 29, 2013. *Dailey v. Crews*, 133 S.Ct. 2027 (2013).

2. Issues raised on appeal and disposition thereof.

The following issues were raised in Mr. Dailey's direct appeal:

1. The trial court erred by admitting evidence that the appellant exercised his right to an extradition hearing and by permitting the prosecutor to comment on that evidence during his opening argument (denied, harmless);
2. The trial court committed per se reversible error by allowing the state to introduce into evidence a book in photograph of Dailey that was not provided to defense counsel during discovery, without holding a Richardson hearing (denied);
3. The trial court erred by admitting evidence based on out of court statements by the co-defendant who did not testify at trial, thus violating Dailey's right to confrontation (denied);
4. The trial court erred in admitting the knife sheath as an exhibit, and accompanying evidence concerning its discovery, because the knife sheath was not connected to the appellant or to the crime and therefore, was irrelevant and inadmissible (denied, harmless);
5. The trial court erred by permitting the state to elicit hearsay evidence of prior consistent statements made to Detective Halliday by the three inmate witnesses (denied, harmless);
6. The trial court erred by restricting defense counsel's cross-examination of Paul Skalnik about the nature of his past and pending felony charges for taking money from women under dishonest circumstances (denied, harmless);
7. The trial court erred by instructing the jury over defense objection that the defense need not have been present when the crime was committed to be guilty of first degree murder (denied);
8. The trial court erred by failing to grant a mistrial when the prosecutor made two comments on the

defendant's failure to testify during her closing argument (denied, harmless);
9. The trial court erred in qualifying Detective Halliday as an expert in homicide investigation and sexual battery because his opinion was based on nothing more than common intelligence and speculation (denied);
10. The trial judge erred by finding three aggravating factors that were not supported by the evidence and by considering a nonstatutory aggravating factor in his discussion of possible mitigating factors (evidence did not support the finding that the murder was committed to prevent a lawful arrest or that it was committed in a cold, calculated, and premeditated manner);
11. The trial court erred by admitting into evidence a certified copy of Dailey's 1979 conviction for aggravated battery, including a notation that another charge had been dropped pursuant to a plea bargain (denied, harmless);
12. The trial court erred by failing to consider statutory and nonstatutory mitigation presented by the defense (trial court erred by finding numerous mitigating factors but according them no weight);
13. The trial judge erred by basing his sentencing, in part, on off the record information from the co-defendant's trial, the co-defendant's PSI, and the prosecutor's sentencing memorandum, thus violating the appellant's right to confront the witnesses (trial court erred in considering this evidence).

The following issues were raised on direct appeal after Mr. Dailey's re-sentencing:

1. Trial court erred by denying appellant's motion for a new penalty phase trial because the jury's death recommendation was based on invalid jury instructions on three of five aggravating factors (denied);
2. The trial court failed to find and weigh mitigating circumstances shown by the evidence and not refuted by the state (denied);
3. The trial court violated appellant's constitutional right to due process by denying his motion to disqualify the sentencing judge because appellant had reasonable grounds to fear that the judge could not be impartial at resentencing (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. Motion to Vacate Judgments and Sentences:

1. Dailey's counsel was prejudicially ineffective at guilt phase (denied);
2. Ineffective assistance of counsel at the sentencing phase (denied);
3. Dailey was deprived of due process and equal protection because trial counsel failed to prepare a competent mental health professional in violation of *Ake v. Oklahoma* (denied);
4. State withheld exculpatory evidence (denied);
5. Newly discovered evidence (denied);
6. Prosecutorial misconduct for presenting misleading evidence and improper argument to the jury (denied);
7. State knowingly presented or failed to correct material false testimony (denied);
8. Dailey's sentencing is disproportionate to co-defendant's sentence (denied);
9. Trial court committed fundamental error by instructing the jury on HAC (denied);
10. Florida capital sentencing statute is unconstitutional (denied);
11. Jury instructions were incorrect and shifted burden to defense to prove death was inappropriate (denied);
12. Jury was misled by unconstitutional instructions which diluted their sense of responsibility (denied);
13. Rules prohibiting juror interviews are unconstitutional (denied);

14. Electrocution is cruel and/or unusual punishment (denied);
15. Cumulative error (denied);

See Dailey v. State, 965 So. 2d. 38 (Fla. 2007).

B. *Writ of Habeas Corpus*:

1. Florida's statute is unconstitutional under *Ring* because it permits the State to indict a defendant without specifying whether it intends to prosecutor under premeditated or felony murder theory (denied);
2. Florida's death sentencing statute is unconstitutional under *Ring* (denied).

C. *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 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 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 explicitly 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 1996, *Dailey v. Florida*, [redacted] (1996) (denying certiorari), Mr. Dailey 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. Dailey is within this class. Because Mr. Dailey "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. Dailey files this motion to vacate and presents his claims for relief arising from the resulting new Florida law, which was previously unavailable when Mr. Dailey filed his prior motions.

4. The nature of the relief sought.

Mr. Dailey 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. Dailey's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* should be vacated.

This claim is evidence by the following:

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 hearing are incorporated herein by specific reference.

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. The claims presented herein could not have been presented before the change in Florida law that these cases and statutory amendment brought about. The claims were simply not ripe before because the basis for the Defendant's claims did not exist before the change in Florida law resulting from *Hurst v. Florida*. Accordingly, this motion is timely.

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

1. The *Hurst* decisions apply retroactively to Mr. Dailey under the equitable "fundamental fairness" retroactivity doctrine, which the Florida Supreme Court ("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. Unlike the *Mosley* Court's *Witt* analysis, which considered whether Mosley's sentence became final after the *Ring* decision as a factor in assessing *Hurst* retroactivity, the Court's fundamental fairness analysis 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.

2. 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.

3. 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. In Mosley's case, the Court looked to whether he raised a challenge under *Ring* "at his first opportunity." *See Id.* 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.

4. In Mr. Dailey's case the Hurst decisions should apply retroactively under the fundamental fairness doctrine. Although his direct appeal was pre-*Ring*, he filed post-conviction motions in the circuit court raising a *Ring*-type claim. Without the benefit of the *Ring* or *Hurst* decisions, Mr. Dailey raised a challenge to Florida's capital sentencing scheme during post-conviction. Mr. Dailey challenged Florida's advisory-jury system as violative of the United States Constitution under *Espinosa* and *Caldwell*. This effort constituted a pre-*Ring* effort to raise *Ring*-like challenges. Mr. Dailey also raised a *Ring* claim in his state habeas petition which was denied. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007).

5. In this case, the interests of finality must yield to fundamental fairness. Mr. Dailey, 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. Dailey "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. Dailey is entitled to retroactive application of both *Hurst* decisions under the *Witt* Test

6. *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.[1] Under *Witt*, Florida courts apply

[1] Mr. Dailey 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

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, make the factual findings that are statutorily required to authorize the imposition of a death sentence.

7. 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).

8. As applied to Mr. Dailey, 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").

9. 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 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

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Witt analysis, but that case left open the possibility for retroactivity under *James*. In addition, Mr. Dailey's 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 Mr. Dailey 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.

systemically infected the truth-determining process at penalty-phase proceedings since the statute was enacted – including Mr. Dailey's trial. Accordingly, the second factor weighs in favor of retroactivity.

10. 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.

11. 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).

12. As a result, 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).

13. 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).

14. Ensuring uniformity and fairness in circumstances in Florida's application of the death 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. Dailey has a federal right to retroactive application of the *Hurst* decisions

15. Mr. Dailey 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.").

16. That case arose when Montgomery launched state post-conviction proceedings seeking the benefit of *Miller v. Alabama* and the Louisiana Supreme Court (in contrast to the Florida Supreme Court in *Falcon*) determined that *Miller* was not retroactive under its state retroactivity doctrines. The United States Supreme Court held that determination made no difference to Montgomery's entitlement to the benefits of *Miller*. Because the rule of *Miller* was substantive, Louisiana was required to apply it on state post-conviction review.

17. 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 determined that the Eighth Amendment required that a jury a determination that the evidence presented at the penalty phase warrants a death sentence must be unanimous.

18. *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.[2] See *Montgomery v. Louisiana*, 136 S.Ct. at 734 (holding that the

[2]In contrast, in *Schriro 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.*

decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).

19. Because the Sixth Amendment rules announced in *Hurst v. State* are substantive, Mr. Dailey 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. Dailey's sentencing was harmless beyond a reasonable doubt

20. The procedure employed when Mr. Dailey 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.

21. At his initial penalty phase, Mr. Dailey's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation, the jury must be correctly instructed as to its

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Florida—was not retroactive on federal collateral review. The rationale of Summerlin was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama*—a case where the certiorari petition had not made a *Hurst* or *Ring* argument—the Supreme Court granted a *Hurst*-based petition for rehearing, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. *See* 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.

sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that the 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. Dailey's jury was told the exact opposite–that Mr. Dailey could be sentenced to death regardless of the jury's recommendation, thus relieving jurors of individual responsibility. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. 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. Dailey's death sentence likewise violate the Eighth Amendment under *Caldwell*. Mr. Dailey's jury was told its sentencing decision was merely advisory. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *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 state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). In Mr. Dailey's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions.

22. Second, although Mr. Dailey's original penalty phase jury returned a unanimous verdict, this does not satisfy the requirements of *Hurst*. Mr. Dailey's jury never made the critical findings necessary before the trial court could consider imposing a sentence of death. No jury findings were made that the existence of each aggravating factor had been proven beyond a reasonable doubt, that the aggravating factors are sufficient, or that the aggravating factors outweigh the mitigating circumstances. *Hurst*, 202 So. 3d at 44.

One cannot assume that every juror found every aggravator beyond a reasonable doubt.

23. The only document returned by the jury was an advisory recommendation that a death sentence be imposed. Although this recommendation was unanimous, it reflects nothing about the jury's findings leading to the final vote. A final 12-0 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. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendations.

24. Third, the Florida Supreme Court rejected two aggravating circumstances presented to the jury and found by the judge – that the murder was committed to prevent a lawful arrest, and that the murder was committed in a cold, calculated, and premeditated manner. Thus, the jury's sentencing recommendation was skewed by the instructions on these aggravating factors, which allowed the jury to consider aggravators that the Florida Supreme Court later found inapplicable. The jury was allowed to consider the avoiding arrest aggravator, and the cold, calculated and premeditated aggravator. The jury's consideration of inapplicable aggravating factors placed several extra "thumb[s]" on "death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992). Alone and in conjunction with the other matters discussed here, the court "may not assume it would have made no difference" that the jury was instructed on inapplicable aggravating factors.

25. Furthermore, a new penalty phase jury was never empaneled after the Florida Supreme Court remanded Mr. Dailey's case and Mr. Dailey never waived his right to a penalty phase jury. Thus, the findings of fact to support his current death sentence and the sentence itself were made by the trial court alone, with no attempt to empanel a jury.

26. The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Dailey's case. 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. Dailey by voting for a life sentence. The State cannot establish beyond a reasonable doubt that the *Hurst v. Florida* error was harmless in Mr. Dailey's 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).

27. 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.

28. As will be discussed further below, Mr. Dailey's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation, 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. Dailey's jury was told the exact opposite – that Mr. Dailey 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 sentenced to be vacated. *Caldwell*, 472 U.S. at 341. Mr. Dailey's death sentence likewise violate the Eighth Amendment under *Caldwell*.

29. Moreover, Mr. Dailey's jurors were not told they could exercise mercy by not joining a death recommendation irrespective of their views on the aggravation and mitigation. *See* ROA Vol. 11, pg. 1425-30. This distinguishes Mr. Dailey's 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 juror, if properly instructed, would have decided to dispense mercy to Mr. Dailey.

30. The error in Mr. Dailey's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Mr. Dailey's death sentence must be vacated and a resentencing ordered.

CLAIM II

Mr. Dailey's 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 previously conducted evidentiary hearing 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.[3] 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 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.

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[3] 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*.

5. 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.[4] 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.[5]

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*, 79So. 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.

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[4] 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.

[5] This would certainly apply to the circumstances in Mr. Dailey's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

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

8. Mr. Dailey's jury was not advised of each jurors' authority to dispense mercy. The circumstances under which Mr. Dailey's 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. Dailey's 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.

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 *James v. State*, 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.[6]

12. Failing to apply *Hurst* retroactively to Mr. Dailey, 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.

13. Finally, Mr. Dailey's death sentence should be vacated because it was obtained in violation of the Florida Constitution. On remand in *Hurst v. State*, the Florida Supreme Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. In addition to Florida's jury trial right, the Florida Supreme Court found that the Eighth Amendment's evolving standards of decency required and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact- finding. *Hurst v. State*, 202 So. 3d at 59–60.

14. The increase in penalty imposed on Mr. Dailey was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition

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[6] "[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.

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. Dailey 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. Dailey's death sentences based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges...

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, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Dailey 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. Dailey. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Dailey was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Dailey 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. Dailey's death sentence.

CLAIM III

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

This claim is evidenced by the following:

1. All other factual allegations in this motion and its attachments and in Mr. Dailey's previous motions to vacate, and all evidence presented by him during the evidentiary hearing 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. Dailey previously presented his original 3.850/3.851 *Strickland* and *Brady/Giglio* claims. Accordingly before the issuance of *Perry v. State* and *Hurst v. State* on October 14, 2016, Mr. Dailey could not present his claim as set forth herein because the new law that would govern any resentencing ordered in Mr. Dailey's case was previously unavailable. Accordingly, Mr. Dailey's 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. *See State v. Steele*, 921 So. 2d 538, 549 (Fla. 2005), quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) ("[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict."). 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. Implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. Before executions are carried out in case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Chapter 2016-13, *Hurst v. State*, and *Perry v. State* is warranted. A previous rejection of a death sentenced defendant's *Strickland* claims, *Brady* claims, and/or newly discovered evidence 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, particular 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. Dailey's previously presented *Strickland* and *Brady/Giglio* 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. Dailey would likely receive a binding life recommendation from the jury.

6. Mr. Dailey's death sentence should be vacated and a new penalty phase ordered.

CONCLUSION

Based on the foregoing, Mr. Dailey prays for the following relief, based on his prima facie allegations showing violation of his constitutional rights: 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, Rule 3.851 relief vacating his death sentence of death 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 that discussions with Mr. Dailey of this motion and its contents has occurred over a period of time as relevant new Florida has unfolded during the past year. Counsel has endeavored to fully discuss and explain the contents of this motion with Mr. Dailey, and that counsel to the best of her ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Successive Motion to Vacate Death Sentence has been furnished by electronic filing to the Clerk of the Court, 6th Judicial Circuit, Pinellas County; Office of the Attorney General (capapp@myfloridalegal.com); Sara Macks, Assistant State Attorney (smacks@co.pinellas.fl.us); Judge Joseph A. Bulone (jbulone@jud6.org); and by U.S. Mail to Richard Dailey on this 9th day of January, 2017.

Respectfully submitted,

/s/ Chelsea R. Shirley
Chelsea R. Shirley
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

/s/ Maria E. DeLiberato
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Fontan@ccmr.state.fl.us

Counsel for Mr. Dailey

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
DIVISION: FELONY

STATE OF FLORIDA

CASE NUMBER Cr. 85-7084 Cfa x.o-D

—vs—

James Hailey
Defendant
#416.074

FILED
JUL 10 1991
Mary Hendrickson

JUDGMENT

The Defendant, James Hailey, being personally before this Court represented by Mark Andraiga and James Lexhardt his attorney of record, and having:

(Check Applicable Provision)
- ☑ 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	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
One	Murder in the first degree	782.04-1A	Capital	Cr.85-7084

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 above 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(4).

☐ The Defendant is ordered to pay an additional sum of three dollars ($3.00) pursuant to F. S. (943.25(8). (This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of _____ pursuant to F. S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ _____

CT CR 82 a (Rev. 11/7/86)

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 the 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 August 7, 1987 (Date)

The Defendant in Open Court was advised of his right to appeal from this Judgement 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.

Thomas E. Penick Jr.
JUDGE

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:

B. Johnson DEP. 2595
(Name and Title)

DONE AND ORDERED IN Open Court at Pinellas County, Florida, this 7th day of June A.D. 19 87. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, James Hadley and that they were placed thereon by said Defendant in my presence in Open Court this day.

Thomas E. Penick Jr.
JUDGE

Page _____ of _____

CT CR 82 b (Rev. 11/7/86) D9jb

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☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
DIVISION: FELONY

STATE OF FLORIDA

CASE NUMBER Crc85-7084Cfxxo-D

—VS—

James Dailey
Defendant
416094

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JUDGMENT

The Defendant, James Dailey, being personally before this Court represented by Henry Andringa, his attorney of record, and having:

(Check Applicable Provision)
- ☑ 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	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
One	Murder in the first degree	782.04-1A	Capital	Crc85-7084

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 above 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(4).

☐ The Defendant is ordered to pay an additional sum of three dollars ($3.00) pursuant to F. S. (943.25(8). (This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of _____ pursuant to F. S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ _____

CT CR 82 a (Rev. 11/7/86) D9jb

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 the 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)

The Defendant in Open Court was advised of his right to appeal from this Judgement 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.

JUDGE

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:

R. Johnson DEP. 2595

(Name and Title)

DONE AND ORDERED IN Open Court at Pinellas County, Florida, this 7th day of August A.D., 1987 I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, James Bailey and that they were placed thereon by said Defendant in my presence in Open Court this day.

JUDGE

Page _____ of _____

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Defendant James Dailey

Case Number CRC 85-7084CFANO-D

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: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Pinellas 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 Sentence 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 _____

☐ The Court hereby imposes court costs in the amount of $200.00 pursuant to F. S. 27.3455.

☒ The $200.00 court costs imposed under F. S. 27.3455 are hereby waived.

DONE AND ORDERED in Open Court at Pinellas County, Florida, this 7th day of August A.D., 19 87.

JUDGE

Page _____ of _____

CT CR 82 d (Rev. 11/7/86) D9/jb

Defendant James Dailey

Case Number Cre 85-7084 Xano-D

SENTENCE

(As to Count One)

The Defendant, being personally before this Court, accompanied by his attorney, Henry Andringa, 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.

IT IS THE SENTENCE OF THE LAW that:

THE SENTENCE OF THE LAW AND THE JUDGMENT AND ORDER OF THIS COURT, that you, for the crime of Murder in the first Degree, for which you now stand convicted, shall be taken by the Sheriff of the County of Pinellas to the common jail of said County or the State Prison in the State of Florida and there securely kept until such time as the Governor of the State of Florida shall in and by his Warrant fix and appoint, at which time you shall be delivered by the Sheriff of said County to the Superintendent of the State Prison of the State of Florida, at the place of execution named in the Governor's Warrant as soon as may be after receipt by the Sheriff of the said County of the Death Warrant for you from the Governor of said State, at which time and place in said Warrant fixed and named, and within the walls of the permanent death chamber provided by law, you shall be, by the proper execution officer of the State Prison, electrocuted until you are dead. And may God have mercy on your soul.

Thereupon the defendant was remanded to the custody of the Sheriff.

7th day of August, 1987

Credit for time served,to-wit: 541 DAYS.

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 _____ above.

Page _____ of _____

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CRC 85-07084 CFANO-D

STATE OF FLORIDA)
)
VS.)
)
JAMES DAILEY)

416614

FINDINGS IN SUPPORT OF SENTENCE

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations, on the 27th day of June, 1987, the Jury rendered a verdict finding the Defendant, JAMES DAILEY, guilty of Murder in the First Degree for the murder of Shelly Boggio.

Thereafter, the Jury, after hearing additional matters, retired to consider an advisory sentence pursuant to Section 921.141(2), Florida Statutes (1985). On the 30th day of June, 1987, the Jury by a 12 to 0 majority returned and, in open Court, recommended that this Court impose the death penalty upon the Defendant, JAMES DAILEY.

In preparing to sentence Defendant, JAMES DAILEY, for first degree murder, this Court again carefully reviewed Section 921.141, Florida Statutes (1985) and many of the decisions of the Florida Supreme Court relating to sentencing for capital felonies (See Appendix). Additionally, this Court carefully reviewed the principles of the United States Constitution that constrain sentencing in capital cases. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972); Proffit v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

It should be noted that this Court presided over the trials of both defendants accused of the murder of Shelly Boggio. Accused of murdering Shelly Boggio were JAMES DAILEY, the Defendant herein, and Jack Pearcy. Both defendants were found guilty of Murder in the First Degree. However, the jury in the Jack Pearcy trial recommended life in prison for Jack Pearcy and this Court, independent of, but in agreement with the advisory recommendation returned by the jury, sentenced Jack Pearcy to life in prison.

This Court carefully considered the evidence presented at each trial, the sentencing phase of each trial and at each sentencing, the Sentencing Memoranda

filed, the arguments of all counsel, and the statement read into the record and placed in the file by the Defendant herein, JAMES DAILEY. The presentence investigation for each defendant was also considered.

Florida law only allows two choices in imposing sentences for capital felonies; i.e., life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. Sec. 775.082, Fla. Stat. (1985).

The Florida Legislature has also established guidelines to control and direct the exercise of the Court's discretion in selecting and imposing a proper sentence in capital cases. Section 921.141(5)(6), Florida Statutes (1985). Pursuant to these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances. The Court may also consider other mitigating circumstances, but not other aggravating circumstances. Elledge v. State, 346 So.2d 998 (Fla. 1977).

The Court may consider only such aggravating circumstances as are proved by the evidence beyond a reasonable doubt, but may consider any mitigating circumstance that it is reasonably convinced exists. State v. Dixon, 283 So.2d 1 (Fla. 1973).

In weighing these aggravating and mitigating circumstances, this Court is not to merely count the number of aggravating circumstances applicable and then mathematically compare the number to the number of mitigating circumstances found to apply. Rather, the Court is to exercise "... a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Lightbourne v. State, 438 So.2d 380 (Fla. 1983). "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances..." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). See also, Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 960 (1976).

After careful and independent* consideration, this Court finds the following aggravating circumstances to exist in this case: (*Tompkins v. State, 12 F.L.W. 44 (Fla. Jan. 12, 1987)).

II. AGGRAVATING CIRCUMSTANCES

A. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON. (Sec. 921.141(5)(b), Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt. The Defendant, JAMES DAILEY, was convicted in Pima County, Arizona, in 1979 for Aggravated Battery. During the sentencing phase, the State introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified that JAMES DAILEY had corresponded with them in 1979 and admitted his conviction in Arizona of a violent offense. These witnesses testified that Defendant, JAMES DAILEY, had been involved in a bar fight, and he had armed himself with a pool cue. There is no reasonable doubt that this aggravating circumstance has been established. The documentary evidence and Defendant's admission establish it.

B. A CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN SEXUAL BATTERY OR ATTEMPTED SEXUAL BATTERY. (Sec. 921.141(5)(d), Fla. Stat. (1985)).

The evidence presented during all phases of this trial establishes beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude floating in the Intercoastal Waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented establishes beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery. Her jeans would not have fallen off during a struggle, nor would have been removed if the only motive was murder.

C. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. (Sec. 921.141(5)(e), Fla. Stat. (1985)).

Shelly Boggio, the victim, knew and trusted the Defendant, JAMES DAILEY. Numerous witnesses had seen the Defendant together with the victim earlier on the evening of the murder. Witnesses, Oza Shaw and Gayle Bailey, specifically testified they saw the Defendant, JAMES DAILEY, with the victim for most of the night, and these witnesses saw the Defendant return home close to the time as the medical examiner, Dr. Joan Wood, would later establish as the time of death.

In order to establish this aggravating factor beyond a reasonable doubt, the State must establish more than the mere fact that the victim knew her

assailants. In Cooper v. State, 492 So.2d 1059 (Fla. 1986), the victim recognized the defendant even though the defendant was wearing a ski mask. The defendant, in the COOPER case, shot the victims and ran from the crime scene. When informed that one of the victims was alive and could possibly identify the defendant, he returned and shot this victim a second time. See also Meeks v. State, 339 So.2d 186 (Fla. 1976).

The instant case is similar to the COOPER case. The Defendant, JAMES DAILEY, knew that Shelly Boggio could identify him and accuse him of sexual battery or attempted sexual battery. The Defendant did more than just attempt to kill. The evidence establishes that the Defendant did everything possible to permanently silence her. Shelly Boggio, the victim herein, was viciously stabbed while on land. According to the testimony presented during the trial, Defendant, JAMES DAILEY, told persons later, "She would not die." "She would not go down." In addition to the stab wounds, there were other assaults upon Shelly Boggio's body. She was beaten about the face, she was choked, she was drug to the water and held under water until she drowned. Her nude body was left in the Intercoastal Waterway to either sink or float away so as to conceal the location of the struggle. Further, in order to either prevent or delay discovery of the crime, the victim's clothes were thrown into the waterway. The next day the Defendant, JAMES DAILEY, took flight from Pinellas County, first traveling to Miami and subsequently escaping to California until his arrest.

Clearly, this aggravating factor is established beyond a reasonable doubt.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. (Sec. 921.141(5)(h), Fla. Stat. (1985)).

The murder of Shelly Boggio was especially heinous, atrocious, and cruel. She was brutally stabbed as she fought frantically and continuously for her life. She suffered numerous "pricking" wounds on her breast and stomach. She was choked. She was thrown into the waterway and held under water until she drowned.

Dr. Joan Wood testified that Shelly Boggio suffered the most severe defensive stab wounds she has ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified that Defendant, JAMES DAILEY, told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by merely piercing the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen,

and neck. These "pricking wounds" are consistent with injury and pain inflicted upon Shelly Boggio during the sexual battery or attempted sexual battery.

The ultimate cause of death was drowning. Dr. Wood made this determination by the chloride concentrations in the victim's heart. Significantly, after having suffered over 30 severe stab wounds, the victim remained alive. Notwithstanding the excruciating pain inflicted on the victim and her mental anguish suffered as she fought for her life, the Defendant threw her into the waterway and held her under the water until she drowned.

This aggravating circumstance is established beyond a reasonable doubt.

E. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (Sec. 921.141(5)(i) , Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt by the various types of multiple wounds inflicted on Shelly Boggio by the Defendant, JAMES DAILEY. The legal requirement of "heightened" premeditation was more than met in this case.

The victim was stabbed or cut 48 times. As stated above, Dr. Wood testified the defensive wounds were the most severe she had ever observed. Further, the victim bore "pricking wounds" which indicated torture. The victim was beaten in the face. The victim was choked. Ultimately, the Defendant had to drown the victim in order to cause death.

The Defendant by his own statement established his mental and physical determination to inflict wounds necessary to kill. "No matter how many times I stabbed her, she would not die."

The facts of this case sub judice are similar to numerous cases previously upheld by the Florida Supreme Court as establishing this aggravating factor. See Jent v. State, 408 So.2d 1024 (Fla. 1982); Herring v. State, 446 So.2d 1049 (Fla. 1984); Puiatti v. State, 495 So.2d 128 (Fla. 1986); Stano v. State, 473 So.2d 1282 (Fla. 1985); and Cooper v. State, 492 So.2d 1059 (Fla. 1986). It should be noted that the COOPER Court also established that this aggravating factor (Section 921.141(5)(i), Florida Statutes (1985)) can coexist with the aggravating circumstance of preventing a lawful arrest or effecting an escape from custody (Sec. 921.141(5)(e), Fla. Stat. (1985)).

In Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987), it was held that a "stabbing frenzy" does not establish this aggravating factor. The Defendant, JAMES DAILEY, went beyond any "stabbing frenzy." In a cold, calculated, and

premeditated manner, he stabbed Shelly Boggio, he beat her, he choked her, and ultimately, he drowned her.

II. MITIGATING CIRCUMSTANCES

The Jury herein was instructed by the Court on four mitigating circumstances plus the catchall mitigating circumstances that the Jury could consider any other aspect of the Defendant's character. The other statutory mitigating circumstances were not presented to the Jury because they clearly and unequivocally do not apply in this case and were not requested under any circumstance by the Defendant.

A. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. (Sec. 921.141(6)(b), Fla. Stat. (1985).

There was some evidence presented by the Defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Vietnam experiences. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the Defendant which would mitigate against or outweigh the established aggravating circumstances.

B. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. (Sec. 921.141(6)(d), Fla. Stat. (1985)).

Two defendants were indicted and convicted for the murder of Shelly Boggio. The evidence presented through all stages of both trials and especially this trial of Defendant, JAMES DAILEY, established beyond a reasonable doubt that JAMES DAILEY was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor, it was major.

JAMES DAILEY'S own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The Defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die." Witnesses presented corroborating evidence that JAMES DAILEY played the major role in the death of Shelly Boggio. Gayle Bailey and Oza Shaw testified that JAMES DAILEY returned home wearing wet pants and wearing no shoes. This is consistent with JAMES DAILEY having physically held the victim under water until she drowned.

C. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON. (Sec. 921.141(6)(e), Fla. Stat. (1985)).

There was absolutely no evidence presented during any phase of this trial which indicated domination by Jack Pearcy over JAMES DAILEY. Both defendants

transported the victim to the Route 688 bridge. The evidence clearly leads to the conclusion that the motive for taking Shelly Boggio to the parking spot by the Route 688 bridge was sexual battery. Further, the evidence establishes that this Defendant, JAMES DAILEY, stabbed, beat, choked, and drowned Shelly Boggio. There is no evidence that Jack Pearcy made or influenced or forced JAMES DAILEY into doing any of these acts.

D. 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. (Sec. 921.141(6)(f), Fla. Stat. (1985)).

There was no evidence presented in this trial that the Defendant, JAMES DAILEY, was substantially impaired by alcohol or drugs.

There was some evidence that the Defendant, JAMES DAILEY, had gone to a bar on the night of the murder. There is absolutely no evidence that JAMES DAILEY was intoxicated. There was testimony that JAMES DAILEY used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw JAMES DAILEY before the murder and after the murder. Neither witnesses indicated that the Defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail establishes the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct.

E. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD.

This "general" mitigating factor received the majority of the evidence put on by the Defendant during the penalty phase. The Defendant was portrayed as having a normal youthful background and having saved two persons from drowning during a high school picnic. He was in the Air Force and served several temporary duty tours in Vietnam. While in the Air Force, he had been married and fathered a daughter. When his ex-wife remarried his former Air Force friend, he allowed this man to adopt his daughter.

For nearly the past 20 years, the Defendant has been a drifter going from city to city and job to job.

During the sentencing phase, the Defendant stated among other things that

he felt remorse for the victim and her family. It is impossible for this Court to know if he genuinely feels remorse for his victim or her family.

This Court does not consider any of the factors presented by the Defendant to mitigate this crime.

CONCLUSION

In concluding these findings, it is only appropriate that the issue of disparate sentences for co-defendants be discussed. The sentence of death for Defendant, JAMES DAILEY, is appropriate even in light of the previous jury recommendation and sentence of life imposed against the co-defendant, Jack Pearcy.

This Court has carefully considered and reviewed many cases discussing the issue of disparate sentences. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Demps v. State, 395 So.2d 501 (Fla. 1981), cert. den. 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Woods v. State, 490 So.2d 24 (Fla. 1986); and Marek v. State, 492 So.2d 1055 (Fla. 1986). Defendant, JAMES DAILEY, was clearly the dominating force behind the murder of Shelly Boggio.

After carefully weighing the aggravating and mitigating circumstances discussed above, and after comparing the circumstances of this case with the circumstances existing for other capital cases reviewed by the Florida Supreme Court and other appellate courts which are listed in the Appendix, and after carefully considering the Constitutional standards set forth in Furman v. Georgia, supra, and Proffitt v. Florida, supra, this Court makes its own reasoned independent judgment, Tompkins v. State, supra, that the statutory aggravating circumstances clearly outweigh the statutory mitigating circumstances, therefore, it is the judgment of this Court that JAMES DAILEY be put to death in the manner provided by Florida law for the first degree murder of Shelly Boggio.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 2nd day of September, 1987.

THOMAS E. PENICK, JR.
Circuit Court Judge

APPENDIX

Adams v. State, 341 So.2d 765 (Fla. 1976).

Agan v. State, 445 So.2d 326 (Fla. 1983).

Aldridge v. State, 351 So.3d 942 (Fla. 1977)

Alford v. State, 307 So.2d 433 (Fla. 1975).

Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 96 S.Ct. 3234, 428 U.S. 923, 49 L.Ed.2d 1226.

Amazon v. State, 487 So.2d 8 (Fla. 1986), cert. den. 107 S.Ct. 314, 93 L.Ed.2d 288.

Barclay v. State, 343 So.2d 1266 (Fla. 1977).

Barclay v. State, 362 So.2d 657 (Fla. 1978).

Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Brown v. State, 367 So.2d 616 (Fla. 1979).

Buckrem v. State, 355 So.2d 111 (Fla. 1978).

Buford v. State, 403 So.2d 943 (Fla. 1981).

Burch v. State, 343 So.2d 831 (Fla. 1977).

Chambers v. State, 339 So.2d 204 (Fla. 1976).

Combs v. State, 403 So.2d 418 (Fla. 1981).

Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Cooper v. State, 492 So.2d 1059 (Fla. 1986).

Darden v. State, 329 So.2d 287 (Fla. 1976), cert. den. 97 S.Ct. 1671, 430 U.S. 704, 51 L.Ed.2d 751.

Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

Delop v. State, 446 So.2d 1242 (Fla. 1983).

Demps v. State, 395 So.2d 501 (Fla. 1981), cert. den. 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

Dobbert v. State, 328 So.2d 433 (Fla. 1976).

Dobbert v. State, 375 So.2d 833 (Fla. 1978).

Douglas v. State, 328 So.2d 18 (Fla. 1976).

Echols v. State, 484 So.2d 568 (Fla. 1985).

Elledge v. State, 346 So.3d 998 (Fla. 1977).

Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

Foster v. State, 369 So.2d 928 (Fla. 1979).

Funchess v. State, 341 So.2d 762 (Fla. 1976).

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

Gardner v. State, 313 So.2d 675 (Fla. 1975).

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CASE NO. CRC 85-07084 CFANO C

STATE OF FLORIDA :
:
vs. :
:
JAMES DAILEY, :
Defendant :

RESENTENCING ORDER

The defendant was tried before this court on June 23, 1987. The jury rendered a verdict on the 27th day of June, 1987, finding the defendant guilty of murder in the first degree. Thereafter, evidence in support of aggravating factors and mitigating factors was heard. The jury returned a twelve to zero verdict on June 30, 1987 and recommended that the defendant be sentenced to death in the electric chair. The court considered the evidence, the jury's recommended sentence, and the memoranda before sentencing the defendant. On the 2nd day of September, 1987, the court sentenced the defendant to death in the electric chair.

On the 22nd day of April, 1992, a Mandate from the Supreme Court of Florida affirming the conviction, reversing the sentence and remanding for resentencing of the defendant was filed in this court. The defendant, together with his attorney and the attorney for the state, appeared before the court on December 9, 1993 for oral testimony and oral resentencing argument. Written memoranda were presented to the court by both sides. The court took under advisement the testimony, oral arguments and memoranda and set final sentencing for this date, January 21, 1994.

This court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and legal oral arguments both in favor and in opposition to the death penalty finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

This aggravating factor was proved beyond a reasonable doubt. The defendant was convicted in Pima County, Arizona, in 1979 for aggravated battery. During the sentencing phase, the state introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified the defendant had corresponded with them in 1979 and admitted his

conviction in Arizona of a violent offense. These witnesses testified the defendant had been involved in a bar fight, and he had armed himself with a billiard cue.

2. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit sexual battery.

The evidence presented during all phases of this trial established beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude, floating in the intercoastal waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented established beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery.

3. The capital felony was especially heinous, atrocious and cruel.

Shelly Boggio, the victim, was brutally stabbed as she fought frantically and continuously for her life. In addition to the deep stab wounds, she suffered numerous "pricking wounds" on her breast and stomach. She was choked. She was dragged into the waterway and held under water until she drowned.

Dr. Joan Wood, the Medical Examiner, testified that Shelly Boggio suffered the most severe defensive stab wounds she had ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified the defendant told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by painful piercing of the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen and neck. These tormenting "pricking wounds" caused pain and suffering to the victim, in addition to the stark terror of the sexual assault.

After being stripped nude, subjected to at least attempted sexual battery, tortured with numerous "prick wounds" and severely stabbed over thirty times the victim would not die. Even though suffering excruciating pain, she fought on only to die of drowning.

While still alive the defendant grabbed Shelly Boggio and threw her into the waterway. He choked her and held her head under water until she quit struggling and died. Due to the chloride

concentrations in the victim's heart the Medical Examiner confirmed death by drowning. This murder was indeed a conscienceless, pitiless crime which was unnecessarily tortuous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this case and no others were considered by this court during this resentencing phase.

No other factors, except as previously indicated in paragraphs 1 - 3 above, were considered in aggravation.

B. MITIGATING FACTORS

During the initial sentencing phase and the resentencing phase the defendant requested the court to consider the following mitigating circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

There was some evidence presented by the defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Air Force duty during the Viet Nam war. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the defendant which would mitigate against or outweigh the established aggravating circumstances.

2. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The evidence presented through all stages of the trial established beyond a reasonable doubt that James Dailey was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor. It was major and the cause of her death. This mitigating factor does not exist.

James Dailey's own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die". Witnesses presented corroborating evidence that James Dailey played the major role in the death of Shelly Boggio. Gail Bailey and Oza Shaw testified that James Dailey returned home wearing wet pants and wearing no shoes. This is consistent with

James Dailey having physically held the victim under water until she drowned.

3. The defendant acted under extreme duress or under the substantial domination of another person.

There is absolutely no evidence in the record of this trial which indicated that any person had domination over the defendant and caused him to commit the capital felony. The evidence proved beyond a reasonable doubt that the defendant stabbed, beat, choked, and drowned the victim. This mitigating factor does not exist.

4. 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.

There was no evidence presented in this trial that the defendant was substantially impaired by alcohol or drugs.

There was some evidence that the defendant had gone to a bar on the night of the murder. There is absolutely no evidence that he was intoxicated. There was testimony that the defendant used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw the defendant before the murder and after the murder. Neither witness indicated that the defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail established the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Therefore, this mitigating factor does not exist.

NON-STATUTORY MITIGATING FACTORS

The defendant in his resentencing memorandum asks the court to consider the following non-statutory mitigating factors.

1. The defendant was in the service and was involved in two or three tours of duty in Viet Nam.

2. The incident occurred while the defendant was intoxicated and he developed a problem with alcohol as result of his military service in Viet Nam.

3. Evidence was presented that the co-defendant, Jack Pearcey, may actually have been the perpetrator of the homicide.

4. The defendant was good to his family, helpful around the home, and never showed signs of violence.

5. Other non-statutory mitigating factors would be the fact that he participated in saving the lives of two young people at an early age.

6. Because of the alcohol problem and the heavy drinking the night of the offense, evidence was presented that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. This was supported by the fact that he had prior history of being admitted for treatment in regard to his alcohol problem. It is not necessary to show that the defendant is insane to qualify for this standard.

1. & 2.) The fact that the defendant served in the Air Force and saw duty in Viet Nam on three occasions is commendable. Thus, the court gave some weight to this non-statutory mitigating factor. However, the record is void of any creditable evidence that the defendant had an alcohol problem, let alone an alcohol problem directly attributable to battle stress or clinically labeled "Viet Nam Syndrome". Thus, this mitigating factor does not exist in this case.

3.) The defendant asserts that there was evidence presented that another person may have been the perpetrator of the homicide. The evidence presented in this trial does not support his assertion. The defendant's own statements, "No matter how many times I stabbed her she would not die", vitiate this claim. Additionally, as discussed in paragraph 3 of the statutory mitigating factors witnesses testified that the defendant returned home wearing wet pants and no shoes. The evidence proved beyond a reasonable doubt that the defendant caused the victim's death. The court considered this mitigating circumstance but gave it no weight.

4.) The fact that the defendant was good to his family and helpful around the home deserves recognition by the court. The defendant cared enough for his daughter to allow her to be adopted by his Air Force buddy when this friend married the defendant's ex-wife. These mitigating facts were given partial weight by this court. However, the statement "(the defendant)...never showed signs of violence" is a gross misstatement of fact. The statement may have been made to indicate 'no violence toward his family' but as discussed in paragraph 1 of the aggravating

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factors, the defendant was convicted in 1979 in Pima County, Arizona for aggravated battery. Therefore, the court gave little weight to the 'non-violent' factor of this non-statutory mitigating circumstance.

5.) The court gave some weight to the mitigating factor that the defendant saved two young people from drowning when he was in high school. However, the saving of two people from drowning does not alleviate the seriousness or mitigate the subsequent criminal act of causing the death of a young person by drowning.

6.) Again the defendant asked this court to consider that the defendant was under the influence of extreme mental or emotional disturbance and suffering from an alcohol problem as both a statutory mitigating factor and a non-statutory mitigating circumstance. The crux of this non-statutory mitigating factor is that the defendant's use of alcohol resulting from his tours in Viet Nam and over a period of time has taken a toll on the defendant's mind and body. In this case the defendant has not shown these circumstances to exist. The witnesses who testified about the defendant's appearance and condition when he returned home the night of the capital felony did not describe him as being intoxicated, under the influence of any substance or suffering from any mental or emotional condition. Fellow inmates who testified at the defendant's trial testified that defendant's recollections of the circumstances on the night of the homicide were clear and detailed, not confused or unbelievable.

The court did give some weight to the fact that the defendant and the victim had been partying and visited some bars together on the night of the capital felony. However, the court does not give much weight to this non-statutory mitigating factor.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the defendant, James Dailey, is hereby sentenced to death for the murder of the victim, Shelly Boggio. The defendant is hereby committed to the

custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Clearwater, Pinellas County, Florida this 21st day of January, 1994.

THOMAS E. PENICK, JR.
CIRCUIT JUDGE

1635 hours

Copies furnished to:
Bernard J. McCabe, State Attorney
John E. Swisher, Esquire
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Appendix D

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____/

MOTION FOR REHEARING

Defendant, JAMES DAILEY, through undersigned counsel, files this motion for rehearing pursuant to Fl. R. Crim. Proc. 3.851(f)(7) and hereby moves this Honorable Court to reconsider its order of April 12, 2017, denying Defendant's Successive Motion to Vacate Death Sentence ("Successive Motion"). By this motion, the Defendant submits that the Court has overlooked and/or misapprehended points of law and facts critical to the resolution of the claims presented in his Successive Motion and discussed below. All claims for relief previously presented to the Court are specifically argued again, no claim previously raised is hereby abandoned. In support thereof, Mr. Dailey states as follows:

1. Mr. Dailey is a prisoner under sentence of death.

2. On January 9, 2017, Mr. Dailey filed a Successive Motion based on the United States Supreme Court and the Florida Supreme Court's decisions in *Hurst v. Florida*[1], *Hurst v. State*[2], *Mosley*[3], and *Asay*[4].

3. The State filed a response on January 27, 2017.

4. This Court held a case management conference on February 20, 2017, and heard legal

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[3] *Mosley v. State*, 209 So.3d 1248 (Fla. 2016).
[4] *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

arguments from both parties.

5. At the case management conference, this Court granted the defense's request for leave to amend to file an affidavit of the Honorable Henry Andringa who represented Mr. Dailey at trial. Subsequently, on March 21, 2017, Mr. Dailey filed a motion to hold his Successive Motion in abeyance.

6. On April 12, 2017, this Court issued a final order denying Mr. Dailey's Successive Motion, denying his motion to hold the Successive Motion in abeyance, and also dismissing the State's motion to strike Mr. Andringa's affidavit.

7. This Court's order fails to address the fact that in Mr. Dailey's Successive Motion, he has *pled* that he raised Sixth Amendment claims before *Ring*[5] was issued by the United States Supreme Court. As such, Mr. Dailey is not asking this Court to ignore the recent Florida Supreme Court opinions, but to take into account the Florida Supreme Court's own language and distinction mentioned in it opinions. In *Mosley*[6], the Court found:

> While this Court did not employ a standard retroactivity analysis in *James*[7], the basis for granting relief was that of fundamental fairness. *Id.* This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, "it would not be fair to deprive him of the *Espinosa* ruling." *Id.*
>
> The situation presented by the United States Supreme Court's holding in *Hurst v. Florida* is not only analogous to the situation presented in *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*. *Id.*
>
> ---
>
> Accordingly, because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley.

8. Mosley's direct appeal was decided after *Ring*. However, further along in the *Mosley*

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[5] *Ring v. Arizona*, 536 U.S. 584 (2002).
[6] *Mosley*, 209 So. 3d at 1275.
[7] *James v. State*, 615 So.2d 668, 669 (Fla. 1993).

opinion at footnote 13, the Florida Supreme Court drops any distinction between *Ring* claims and refers to the type of claim which *Ring* represents, a Sixth Amendment claim. The Court explained:

> The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt*[8] analysis is that under *James*, a defendant or his lawyer would have had to timely raise the constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument. In this case, we determine that Mosley would be entitled to retroactive application of *Hurst* under either approach.

Mosley, 209 So. 3d at 1276.

9. *James* is still good law as it continues to be recognized and cited by the Florida Supreme Court. Accordingly, fundamental fairness would require that Mr. Dailey's Successive Motion be considered timely and his claims determined on their merits. Like Mosley, Mr. Dailey raised the same claims that were held to be valid in *Ring* and in *Hurst*, but he was incorrectly denied relief. The interests of finality must yield to fundamental fairness.

10. In its Order summarily denying the Successive Motion, this Court also assumes that the issue of retroactivity related to *Hurst* has been settled and decided. That is error. On February 13, 2017, the State filed a petition for writ of certiorari to the United States Supreme Court in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016)[9]. On February 17, 2017, the Office of the Attorney General filed an Application for an Extension of Time to File a Petition for a Writ of Certiorari in order to appeal the Florida Supreme Court's decision in *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). And, Asay's defense counsel has until May 2, 2017, to file a Writ of Certiorari with the United States Supreme Court. All of these writs challenge, or potentially will challenge, the retroactive

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[8] *Witt v. State,* 387 So. 2d 922 (Fla. 1980).

[9] Petitioner filed his Brief in Opposition on April 18, 2017, and the petition will be conferenced next month.

effect of *Hurst* to pre-*Ring* cases. The landscape of the law in this issue is far from settled.

11. Additionally, this Court's ruling also fails to consider the Florida Supreme Court's finding in *Hurst v. State*,[10] which held that a *Hurst* sentencing error has Eighth Amendment implications. The Florida Supreme Court has not addressed the retroactive application of *Hurst v. State* in light of this sentencing error also violating the Eighth Amendment. In *Hurst v. State*, the Florida Supreme Court held:

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended *verdict* resulting in a death sentence is required under the Eighth Amendment. (Emphasis added)....The foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. (FNs omitted) ... If death is to be imposed, unanimous jury sentencing recommendations, *when made in conjunction with the other critical findings unanimously found by the jury*, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 59-60 (Emphasis added).

12. Mr. Dailey's sentence was not the product of *any* jury findings or verdict – let alone a unanimous one. His sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. A new penalty phase jury was never empaneled after the Florida Supreme Court remanded Mr. Dailey's case on direct appeal and Mr. Dailey never waived his right to a penalty phase jury. Thus, it cannot be said that Mr. Dailey's sentence was based on a "unanimous jury sentencing recommendation, when made in conjunction with the other critical findings unanimously found by the jury." *Id.* Mr. Dailey had no jury sentence him to death.

13. The retroactivity of the *Hurst* opinions should be decided favorably for Mr. Dailey

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[10] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

when considered as a violation of the Eighth Amendment, as well as the Sixth Amendment.

14. Finally, this Court's summary denial of Mr. Dailey's motion fails to consider the Florida Supreme Court's opinion in *Perry v. State,*[11] where the Florida Supreme Court found Florida's post-*Hurst* revision of the death penalty statute was still unconstitutional after reviewing the statute in light of the its opinion in *Hurst* and the Florida Constitution. The Florida Supreme Court held[12]:

> that as a result of the *longstanding adherence to unanimity* in criminal jury trials in Florida, the right to a jury trial *set forth in article I, section 22 of the Florida Constitution* requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. [fn4] *Hurst*, SC12-1947, slip op. at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id,* at *23-24, 36. (Emphasis added.)

15. Importantly, Footnote 4 of *Perry* states, "In *Hurst*, we also decided the requirements of unanimity under both the Sixth and Eighth Amendments to the United States Constitution, but our basic reasoning rests on Florida's independent constitutional right to trial by jury. Art. I, § 22, Fla. Const." Therefore, it has always been a requirement under Florida jurisprudence that juries must return unanimous verdicts. Thus, retroactivity is not an issue for Mr. Dailey, whose case does not pre-date the Florida Constitution.

WHEREFORE, Mr. Dailey asks this Court to reconsider the denial of his Successive Motion, and to grant him a new penalty phase.

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[11] *Perry v. State*, 210 So. 3d 630 (Fla. 2016).
[12] *Perry*, 210 So. 3d at 633.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed with Clerk for the 6th Judicial Circuit, Pinellas County served upon Assistant Attorney General Christina Pacheco (christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com); Assistant State Attorney Sara Macks (smacks@co.pinellas.fl.us); Assistant State Attorney Kristi Aussner (SA6appealservice@co.pinellas.fl.us); and The Honorable Frank Quesada (bfedersp@jud6.org); on this 26 day of April, 2017.

Respectfully submitted,

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Appendix E

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-1073

JAMES MILTON DAILEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

RESPONSE TO ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Dailey's successive motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Dailey's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The issue in this case is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Dailey *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 already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*, however, this Court has consistently applied a state-law cutoff at the date *Ring* was decided – June 24, 2002 – to deny relief in dozens of other collateral review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Dailey. Denying Dailey *Hurst* relief because his sentence became final in 1996, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Dailey is entitled to *Hurst* retroactivity as a matter of federal law.

CITATIONS

Citations shall be as follows: The record on appeal from Dailey's trial proceedings shall be referred to as "TR 1" followed by the appropriate volume and page numbers. The record of appeal from Dailey's resentencing and second direct appeal shall be referred to as "TR 2" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive post-conviction motion is comprised of one volume and shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

All emphasis is supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

James Dailey has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. James Dailey, through counsel, respectfully requests this Court grant oral argument pursuant to Fla. R. App. P. 9.320. Dailey also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Dailey the opportunity for full briefing in this case 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) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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STATEMENT OF THE CASE

Dailey was tried by a jury and found guilty of one count of first degree murder. By a vote of twelve to zero, a jury returned a recommendation of death. Dailey was ultimately sentenced to death on August 7, 1987. On November 14, 1991, this Court affirmed the conviction, but vacated Dailey's death sentence, because the trial court improperly instructed the jury on and erroneously found two aggravating circumstances: (1) "cold, calculated, and premeditated;" and (2) that the crime was committed to avoid arrest. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991). This Court held that neither aggravating circumstance applied to the case. *Id*. This Court also held that the trial court erred when it failed to assign any weight to numerous mitigating circumstances, and erroneously relied on evidence from another trial, evidence which was not introduced in the guilt or penalty phase of Dailey's trial. *Id*. In addition to these errors, this Court identified six other errors, but deemed them "harmless." *Id*.

On remand, the trial court, *without empaneling a new jury*, again sentenced Dailey to death. This Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995). To be clear, Dailey did not waive his right to a jury, and indeed specifically filed a motion to empanel a new jury and hold a new penalty phase. TR 2 2:207-09. This motion was denied by the trial court, and the denial was affirmed by this Court. *Dailey*, 659 So. 2d at 247. Dailey also asserted that "the jury recommendation of death was invalid and he was entitled to an entire new penalty phase trial before a new jury for two reasons: First, the original jury was given

vague instructions on three aggravating circumstances (HAC, avoid arrest, and CCP); and second, the jury was instructed on two aggravating circumstances (avoid arrest and CCP) that were unsupported by the evidence and later struck by this Court." *Id*. In denying those claims, this Court held, "[w]e will not presume that the jury relied on the infirm aggravating circumstances in recommending death under the circumstances of this case." *Id*. at 248. The Supreme Court of the United States denied certiorari on January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

On March 28, 1997, Dailey filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. He filed amended motions on April 11, 1997, and November 12, 1999. Dailey raised several claims in that motion relevant to this appeal including: the trial court committed fundamental error by instructing the jury regarding the aggravating factor of heinous, atrocious, or cruel, and the jury instruction was unconstitutionally vague; Florida's capital sentencing statute is unconstitutional on its face; Dailey's penalty phase counsel was ineffective for failing to object to the penalty phase jury instructions which were incorrect under Florida law; and Dailey's counsel was ineffective for failing to object to comments, questions, and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing. *Dailey*, 659 So. 2d at 42 n.4.

The circuit court denied the Motion after a limited evidentiary hearing. Dailey appealed and filed a petition for state habeas relief to the Florida Supreme Court. In his state habeas, Dailey argued that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). *Dailey v.*

State, 965 So. 2d 38, 48-49 (Fla. 2007). This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Id*.

Dailey filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). R. 4-52. The circuit court denied Dailey's motion. R. 191-98. Dailey filed a motion for rehearing on April 26, 2017, which was denied on May 12, 2017. R. 199-205. Dailey filed this timely appeal on June 7, 2017. R. 206-07.

Thereafter, on June 21, 2017, Dailey filed a second successive motion to vacate his judgment and sentence based on newly discovered evidence of actual innocence. That same day, Dailey filed a Motion to Relinquish Jurisdiction with this Court which was granted on September 14, 2017. At the conclusion of those proceedings, this Court issued an order to show cause on April 13, 2018, as to why the trial court's denial of Dailey's *Hurst* claim should not be affirmed in light of *Hitchcock v. State*, SC17-445.

ARGUMENT

I. Dailey was denied his constitutional right to a jury trial under the Sixth Amendment.

This Court has recognized the fundamental right to a trial by jury under both the United States and Florida Constitutions. "The Supreme Court made clear, as it had in *Apprendi*, that the Sixth Amendment, in conjunction with the Due Process clause, 'requires that each element of a crime be proved to a jury beyond a reasonable doubt.' The Court reiterated, as it had in *Apprendi*, 'that any fact that expose[s] the defendant to a greater punishment

than that authorized by the jury's guilty verdict is an 'element' that must be submitted to [the] jury.'" *Hurst v. State*, 202 So. 3d 40, 51 (Fla. 2016). The guarantee of a jury trial under the Sixth Amendment is enshrined in our country's jurisprudence. Specifically, under the Sixth Amendment, there is a guarantee "that all the facts essential to imposition of the level of punishment that the defendant receives… must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring). In Dailey's case, this never occurred and at no point did Dailey waive this right. On the contrary, as the history of this case clearly demonstrates, Dailey has been continuously raising his denial of a jury from resentencing onwards. The denial of his jury right is egregious and his death sentence is unconstitutional.

"Where a defendant's death sentence has been vacated and the case is remanded to the trial court to conduct a new penalty phase proceeding before a new jury, '[t]he resentencing should proceed *de novo* on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity.'" *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001), citing *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986); *see also Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997). "In fact, as we have explained, a resentencing is a 'completely new proceeding,' and the trial court is under no obligation to make the same findings as those made in a prior sentencing proceeding." *Id.*, citing *Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997) (citing *King v. Dugger*, 555 So. 2d 355, 358–59 (Fla. 1990)). "[W]hen a sentence is vacated the defendant is resentenced

at a new proceeding subject to the full panoply of due process rights…" *State v. Fleming*, 61 So. 3d 399, 408 (Fla. 2011). Even though this is the state of law in Florida, Dailey was deprived of its application.

The trial judge alone heard arguments and reweighed the aggravation and the mitigation in this case and gave great weight to the jury recommendation of death, even though that jury based their recommendation on an erroneous instruction of CCP, one of the weightiest aggravators, and the avoid arrest aggravating factor. "Employing an invalid aggravating factor in the weighing process 'creates the possibility ... of randomness,' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (internal citations omitted). "Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'" *Id*., citing *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990). The weighing of aggravators and mitigators, under the Sixth Amendment, should be done "by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

Under the principles of fundamental fairness, Dailey is entitled to a review of his death sentence and should have a jury, not a judge, weigh his aggravation and mitigation. To continue to deny Dailey review of his constitutional challenges is an arbitrary and

capricious result that also violates the Eighth Amendment. "This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). This case is one of those cases that this Court should reconsider.

The increase in penalty imposed upon Dailey was without any jury at all and constitutes fundamental error. Dailey's death sentence was based on flawed jury instructions, given to a jury who was erroneously instructed on two weighty aggravating circumstances. This poisoned the fact-finding of the trial court, who chose to adopt, for a second time, the fundamentally flawed recommendation and improperly instructed jury recommendation. No jury unanimously found any aggravating factors existed at all, that sufficient aggravating factors existed for the imposition of the death penalty, or that the aggravating factors outweighed the mitigating circumstances. In addition, the trial court initially ignored evidence of statutory mitigation and relied on evidence not presented in Dailey's guilt or penalty phase in sentencing him to death. The flaw in the trial court's assessment, and the fact that the State had failed to prove the weighty aggravating circumstance of CCP and avoid arrest, compelled this Court to reverse Dailey's sentence on direct appeal.

This Court specifically found that the trial court's finding of CCP and for the purpose of avoiding arrest was not supported by the evidence. Further, this Court found that "the trial court recognized the presence of numerous mitigating circumstances, but then accorded them no weight at all. This was error." *Dailey*, 594 So. 2d at 259.

On remand, the trial court, *without empaneling a new jury*, again sentenced Dailey to death, based upon its own reweighing of the aggravation and the mitigation. The new death sentence was based upon the original flawed recommendation of a jury which was instructed on two aggravating factors that were not supported by the evidence. This flaw continued into Dailey's new death sentence as a result of the trial court failing to empanel a new and properly instructed jury. Dailey never waived his right to a jury and should have had a new jury empaneled to hear the evidence and make the requisite findings.

The United States Supreme Court has held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L.Ed.2d 725 (1990)…. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.' *Clemons, supra*, 494 U.S., at 752, 110 S. Ct., at 1450 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); *see Parker v. Dugger*, 498 U.S. 308, 321(1991).

Sochor v. Florida, 504 U.S. 527, 532 (1992). Depriving Dailey of the "individualized treatment" from the actual reweighing of his aggravating and mitigating factors by a jury, placed the thumb on death's side of the scale.[1]

[1] *Sochor* is in stark contrast to this Court's prior holding that it will not "presume that the jury relied on the infirm aggravating circumstances in recommending death under the circumstances of this case." *Dailey v. State*, 659 So. 2d 246, 248 (Fla. 1995). There was no evidence to support this erroneous assumption which further taints Dailey's death sentence. Further, such a finding ignores this Court's own

The Supreme Court has stated, as it had in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth Amendment, in conjunction with the Due Process clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. This Court reiterated, echoing *Apprendi*, "that any fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict is an 'element' that must be submitted to [the] jury." *Hurst v. State*, 202 So. 3d 40, 51 (Fla. 2016). The trial court in Dailey's case did not do this and simply used the prior jury recommendation, tainted by the improper CCP and avoid arrest instruction, in making its own re-evaluation of the mitigating circumstances. *See Dailey v. State*, 659 So. 2d 246 (Fla. 1995). This violated Dailey's Sixth Amendment right to a jury trial.

II. Fundamental fairness requires that Dailey's death sentence be re-evaluated based on new constitutional precedent.

The equitable "fundamental fairness" retroactivity doctrine, which this Court has applied in cases such as *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *James v. State*, 615 So. 2d 668 (Fla. 1993) should be applied to Dailey. This Court has granted relief in the past to defendants based upon "changes in the law retroactively to postconviction defendants who preserved the issue for review on their direct appeal prior to the change." *State v. Silva*, 235 So. 3d 349, 354 (Fla. 2018), (Lewis, J. dissenting).

In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court granted relief to a defendant

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precedent in Dailey's case which found three reversible errors and six additional "harmless errors" on direct appeal. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991).

who had asserted at trial and on direct appeal that the jury instruction pertaining to the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague before the United States Supreme Court ultimately reached that same conclusion in *Espinosa v. Florida*, 505 U.S. 1079 (1992). This Court concluded that despite James' case becoming final before the principle of law had been decided, "it would be unjust to deprive James of the benefit of the Supreme Court's holding in *Espinosa* after he had properly presented and preserved such a claim." *State v. Silva*, 235 So. 3d at 355, (Lewis, J. dissenting); *see also James v. State*, 615 So. 2d 668, 669 (Fla. 1993).

In *Mosley*, a majority of this Court recognized that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley v. State*, 209 So. 3d 1248, 1274-75 (Fla. 2016). Mosley received the retroactive benefit from *Hurst v. State* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley." *Id*. at 1275. In *Mosley*, this Court explained that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*." *Id*. This Court was correct because "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty

sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted).

This Court has not hesitated in the past to apply fundamental fairness to defendants who have properly preserved challenges before there were decisions enshrining those challenges as law. In fact, when this Court has declined to apply the rule of fundamental fairness as expounded in *James*, it has been as a result of failures to preserve the issue for appeal. *See Glock v. Moore*, 776 So. 2d 243, 254-55 (Fla. 2001) ("In *James*, however, the defendant properly raised the issue in the trial court and again on appeal. Glock, on the other hand, failed to raise the issue on appeal."). Applying fundamental fairness and retroactive effect to a defendant who has preserved the issue does not unnecessarily open the flood gates, but only grants relief to those, like Dailey, who have specifically preserved the issues. To do otherwise would not only engender an unfair and random result, but would be a violation of due process rights under the Fourteenth Amendment and the corresponding provisions of the Florida Constitution. "Due process requires that fundamental fairness be observed in each case for each defendant." *Gore v. State*, 719 So. 2d 1197, 1203 (Fla. 1998).

Further, it undercuts the importance of preservation of issues. "Preservation of the issue is perhaps the most basic tenet of appellate review, *see Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for

capital defendants." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in result). "This preservation approach—enshrined in *James*—ameliorates some of the majority's concern with the effect on the administration of justice. Defendants, like Hitchcock, who did not properly preserve their constitutional challenges—through trial and direct appeal—forfeited them just as any other defendant who fails to raise and preserve a claim. However, those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge." *Id*. "Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing." *Id*. Further, "it is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrs.*, 2017 WL 5177614, at *3 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

As noted above, like *Mosley*, Dailey raised Sixth Amendment challenges to the constitutionality of Florida's death penalty statute early and often: before his second resentencing, on direct appeal, in his postconviction motion, and in his state petition for habeas corpus. Dailey has consistently challenged the validity of Florida's sentencing scheme based upon the same arguments that were credited in *Hurst v. Florida*, *Hurst v. State* and *Perry v. State*, 210 So. 3d 630 (Fla. 2016). In this case, the interests of finality must yield to fundamental fairness. It would be fundamentally unfair and an error to ignore

the Sixth Amendment infirmities in Dailey's case, especially in light of the fact that he raised pre-*Apprendi* and pre-*Ring* claims in a timely fashion and due to this Court's prior erroneous legal interpretations, was denied relief at that time. Applying the recent Sixth Amendment decisions retroactively to Dailey "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* at 1282.

Petitioners who preserved the Sixth Amendment issue, the right to a jury weighing the aggravation and the mitigation and the right to a unanimous jury, "should also be entitled to have their constitutional challenges heard." *See Asay v. State*, 210 So. 3d 1, 30 (Fla. 2016) (Lewis, J. concurring). "Accordingly, the fact that some defendants specifically cited the name *Ring* while others did not is not dispositive. Rather, the proper inquiry centers on whether a defendant preserved his or her substantive constitutional claim to which and for which *Hurst* applies." *Id*. Dailey did exactly what Justice Lewis contemplated and preserved a pre-*Ring* Sixth and Eighth Amendment challenge and argued that the aggravation and the mitigation in his case should have been weighed by a jury and not a judge. He raised these issues before his resentencing, on his direct appeal, and preserved the issues in his subsequent appeals and postconviction litigation. This is the exact situation that should merit retroactive constitutional relief, irrespective of whether the case came before or after *Ring*. "[T]hose defendants who challenged Florida's unconstitutional

sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge." *Id*. Dailey's Sixth and Eighth Amendment challenges to his sentence deserve to be heard.

Dailey's case is a prime example of why this Court's arbitrary partial retroactivity bright line rule is erroneous. Denying relief to Dailey would fly in the face of this Court's precedent as laid out in *James* and *Mosley*. Dailey, under principles of fundamental fairness, should have his constitutional challenges heard and should be entitled to a new penalty phase.

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

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Dailey the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Dailey *Hurst* retroactivity because his death sentence became final in 1996, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

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

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). In other words, the death penalty cannot be imposed in certain cases in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308. This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief.

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;[2] 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;[3] whether an extension was sought for a

[2] *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*).
[3] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief

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 U.S. Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

To deny Dailey retroactive relief under *Hurst* on the ground that his death sentence became final before June 24, 2002, while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002, violates Dailey's 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)).

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

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture – on collateral review – differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v.*

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was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

Florida, 379 U.S. 184, 191 (1964).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Dailey violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures.[4]

III. This Court's *Hurst* decisions violates *Caldwell*.

Dailey's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation as binding, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that the 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. Thus, "the jury instructions in [Dailey's] case[s] impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Truehill v. Florida*, 138 S.

[4] *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).

Ct. 3, 3 (2017) (Sotomayor, J., dissenting).

Like the petitioner in *Truehill*, Dailey also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id*. This Court just recently, in another case, addressed that defendant's Eighth Amendment and *Caldwell* challenges to his advisory jury recommendation for death, in *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *1 (Fla. Apr. 5, 2018). However, in dismissing Reynolds's *Caldwell* claim, this Court completely misapprehended, and failed to address, the issue. This Court held that Reynolds's "jury was not misled as to its role in sentencing" at the time of his capital trial. *Id*. at *12. Thus, the majority concluded that *Caldwell* was not violated because, at the time they rendered their advisory recommendation, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id*. at *10. This Court failed to address why treating this advisory, non-binding jury recommendation as a mandatory jury verdict did not violate *Caldwell*, since Reynolds's jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed otherwise. The issue raised by Reynolds, and here by Dailey, is not whether their juries were properly instructed *at the time of their capital trials*, but instead, whether *today* the State of Florida can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. The United

States Supreme Court, in *Hurst v. Florida*, warned against that very thing. The Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of 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, 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.").

Second, this Court's analysis of the *Caldwell* issue in *Reynolds* failed to address the unconstitutional status of Florida's death penalty law. In denying Reynolds's *Caldwell* claim, this Court relied on Justice O'Connor's position in *Romano v. Oklahoma*, 512 U.S. 1 (1994), to find that a *Caldwell* error only occurs when the remarks to the jury improperly described the role assigned to the jury by local law. *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *9 (Fla. Apr. 5, 2018). As a result, this Court concluded that since pre-*Ring*

Florida juries were properly instructed as to the status of Florida law, as it existed at that time, no error occurred. This Court held:

> Therefore, there cannot be a pre-*Ring*, *Hurst*-induced *Caldwell* challenge to Standard Jury Instructions 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation.

Id. However, this conclusion fails to address the unconstitutional nature of Florida's law at that time. Dailey does not dispute that prior to *Hurst*, the standard jury instructions did properly describe the jury's role as being advisory only and ultimately subject to the trial court's "final decision," including regarding the findings necessary to render a defendant eligible for the death penalty.

But, surely the general rule stated by Justice O'Connor in *Romano* presumes that the role assigned to the jury by local law is otherwise consistent with the United States Constitution. It is nonsensical to conclude that Justice O'Connor meant no error occurs if the remarks to the jury properly described the jury's role according to local law, but that local law violated the federal constitution. Accurately instructing the jury on an unconstitutional law is still unconstitutional. And, this Court's repeated treatment of these accurately instructed, yet unconstitutional, jury *recommendations* as "binding" and as "the necessary factual finding that *Ring* requires" is also unconstitutional. *Hurst*, 136 S. Ct. at 622.

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

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the U.S. 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.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule."). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32. The *Hurst* decisions established at least two substantive rules – one under the Sixth Amendment and one under the Eighth Amendment. Both are substantive rules that must be applied retroactively to Dailey by this Court under the Supremacy Clause.

CONCLUSION

This Court should hold that the *Hurst* decisions are retroactive to Dailey, vacate Dailey's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Christina Pacheco, Christina.Pacheco@myfloridalegal.com & cappapp@myfloridalegal.com; on this 3rd day of May, 2018.

Respectfully submitted,

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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
CASE NO. SC 17-1073

JAMES MILTON DAILEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

APPELLANT'S REPLY TO STATE'S REPLY TO ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Mr. Dailey relies on the merits of his Response.

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ARGUMENT IN REPLY

I. Dailey's claims are not foreclosed or untimely.

Contrary to the State's arguments, this Court's existing precedent does not foreclose relief to Dailey. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), a majority of this Court recognized that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Id*. at 1274-75. Mosley received the retroactive benefit of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley." *Id*. at 1275. In *Mosley*, this Court explained that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also *concerns a decision of greater fundamental importance* than was at issue in *James*." *Id*. (emphasis added). Dailey is simply asking this Court to apply its own precedent to him.

Like Mosley, Dailey raised Sixth Amendment challenges to the constitutionality of Florida's death penalty statute early and often: before his second sentencing, on direct appeal, in his postconviction motion, and in his state petition for writ of habeas corpus. Dailey has consistently challenged the validity of Florida's sentencing scheme based upon the same arguments that were credited in *Hurst v. Florida*, 136 S. Ct. 616 (2016),

Hurst v. State and *Perry v. State*, 210 So. 3d 630 (Fla. 2016). In this case, the interests of finality must yield to fundamental fairness. It would be fundamentally unfair and an error to ignore the Sixth Amendment infirmities in Dailey's case, especially in light of the fact that he raised pre-*Apprendi*[1] and pre-*Ring*[2] claims in a timely fashion and due to this Court's prior erroneous legal interpretations, was denied relief at that time. Applying the recent Sixth Amendment decisions retroactively to Dailey "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*, 209 So. 3d at 1282.

Petitioners who preserved the Sixth Amendment issue, the right to a jury weighing the aggravation and the mitigation and the right to a unanimous jury, "should also be entitled to have their constitutional challenges heard." *Asay v. State*, 210 So. 3d 1, 30 (Fla. 2016) (Lewis, J. concurring). "Accordingly, the fact that some defendants specifically cited the name *Ring* while others did not *is not dispositive*. Rather, the proper inquiry *centers on whether a defendant preserved his or her substantive constitutional claim* to which and for which *Hurst* applies." *Id*. (emphasis added). "Similarly, I believe defendants who properly preserved the substance of a *Ring* challenge at trial and on direct

[1] *Apprendi v. New Jersey*, 539 U.S. 466 (2000).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

appeal prior to that decision should also be entitled to have their constitutional challenges heard." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J. concurring). Dailey did exactly what Justice Lewis contemplated and preserved a pre-*Ring* Sixth and Eighth Amendment challenge, and argued that the aggravation and the mitigation in his case should have been weighed by a jury and not a judge. He raised these issues before his resentencing, on direct appeal, and preserved the issues in his subsequent appeals and postconviction litigation. This is the exact situation that should merit retroactive constitutional relief, irrespective of whether the case came before or after *Ring*. "[T]hose defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are *entitled to consideration of that constitutional challenge*." *Id.* (emphasis added). Dailey's Sixth and Eighth Amendment challenges to his sentence deserve to be heard.

Lastly, the State relies on *Hamilton v. State*, 236 So. 3d 276 (Fla. 2018), for the proposition that Dailey's successive motion was untimely. Dailey's successive motion for postconviction relief was not untimely under Fla. R. Crim. P. 3.851. Like Dailey, after both *Hurst* decisions but before decisions on retroactivity were issued, numerous capital defendants filed successive postconviction motions based on those decisions. Yet, relief was granted. *See Matthews v. State*, Circuit Court No. 2008-CF-030969, Volusia County, FL; *Martin v. State*, Circuit Court No. 2009-CF-014374, Duval County, FL; *Calhoun v. State*, Circuit Court No. 2011-CF-000011, Holmes County, FL; and *Rigterink v. State*,

Circuit Court No. 2003-CF-006982, Polk County, FL. Denying Dailey similar relief amounts to an irregular application of state procedural grounds which is not a valid basis to bar appellate review. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *James v. Kentucky*, 466 U.S. 341, 345-49 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Staub v. Baxley*, 355 U.S. 313, 318-20 (1958) (citing the seminal cases of *Ward v. Board of County Com'rs of Love County, Okl.*, 253 U.S. 17 (1920), and *Davis v. Wechsler*, 263 U.S. 22 (1923)); *Williams v. Georgia*, 349 U.S. 375, 382-89 (1955), reaffirmed in *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam). Further, applying state procedural grounds in a novel or unpredictable manner also cannot be a basis to bar appellate review. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-58 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Therefore, since similarly filed successive motions were held to be timely and granted, Dailey's successive motion must also be considered timely.

II. Dailey's claim that he was denied his Constitutional right to a jury trial under the Sixth Amendment is not procedurally barred.

First, the State's ignores: (1) the grievousness of having a jury consider an unsupported aggravating factor; and (2) the importance of each jury finding that is necessary before a defendant becomes eligible for death. The trial judge alone heard arguments and reweighed the aggravation and the mitigation in this case and gave great weight to the jury recommendation of death, even though that jury based their

recommendation on an erroneous instruction of CCP, one of the weightiest aggravators, and the avoid arrest aggravating factor. The failure to empanel a new penalty phase jury was error. Dailey's original penalty phase jury was instructed on two improper and weighty aggravating factors. There is simply no way to now determine whether that had any effect on Dailey's jury recommendation. It was the *jury*'s responsibility, after the striking of the CCP and avoid arrest aggravator, to consider and weigh the remaining aggravating and mitigating factors. Without those weighty aggravating factors, the scales may very well have tipped towards a life recommendation. The State cannot prove beyond a reasonable doubt that the jury would have again returned a recommendation of death.

The United States Supreme Court has held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L.Ed.2d 725 (1990)…. Even when other valid aggravating factors exist, *merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances*.' *Clemons*, supra, 494 U.S., at 752, 110 S. Ct., at 1450 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); see *Parker v. Dugger*, 498 U.S. 308, 321(1991).

Sochor v. Florida, 504 U.S. 527, 532 (1992) (emphasis added). Depriving Dailey of the "individualized treatment" from the *actual* reweighing of his aggravating and mitigating factors *by a jury*, placed a thumb on death's side of the scale. Nor does Florida's "advisory recommendation by the jury" meet "the *necessary factual finding* that *Ring*

requires." *Hurst*, 136 S. Ct. at 622 (emphasis added).

Second, the State fails to address that under the principles of fundamental fairness, Dailey is entitled to a review of his death sentence and should have a jury, not a judge, weigh his aggravation and mitigation. To continue to deny Dailey review of his constitutional challenges is an arbitrary and capricious result that also violates the Eighth Amendment. "This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). This case is one of those cases that this Court should reconsider.

In light of *Hurst*, this Court's prior rejection of Dailey's challenge to his judge-only resentencing was error. This Court has not hesitated, in the past, to apply fundamental fairness to defendants who have properly preserved challenges before there were decisions enshrining those challenges as law. *See James v. State*, 615 So. 2d 668 (Fla. 1993) and *Glock v. Moore*, 776 So. 2d 243 (Fla. 2001).

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

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Dailey the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Dailey *Hurst* retroactivity because his death sentence became final in 1996, 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.

As this 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.

There is no discernible difference between the jury findings (or lack thereof) in Dailey's case and the jury findings (or lack thereof) in any of the scores of cases in which this Court has found the *Hurst* error not to be harmless.

This Court has no clearer picture of what Dailey's jury based its recommendation upon than the thought processes of a jury that returned a generalized non-unanimous recommendation for death. Failure to grant Dailey relief, while granting relief to similarly situated defendants, violates Dailey's equal protection rights under the Fourteenth Amendment to the United States' Constitution (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 the arbitrary infliction of the death penalty under the Eighth Amendment. (*Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992)

(per curiam)). The State wholly failed to address Dailey's Equal Protection argument.

IV. This Court's *Hurst* decisions violates *Caldwell*.

The State misapprehends the nature of Dailey's Eighth Amendment argument and in doing so, employs circular logic. The State relies on this Court's precedent in *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018), to conclude that there is no *Caldwell v. Mississippi*, 472 U.S. 320 (1985), issue because the jury instructions in Dailey's case "clearly did not mislead jurors as to their responsibility under the law." (Reply Brief, p. 10). The crux of the State's argument is that because the jury was properly instructed as to its role at the time of trial, albeit under an unconstitutional scheme, there can be no error. This argument must fail because properly instructing a jury on an unconstitutional law, is unconstitutional. "Correctly" instructing a jury that their verdict was merely advisory is the *Caldwell* error, as *Hurst* makes clear.

This Court's decisions which repeatedly treat a jury's *advisory recommendation* as *binding*, is error. *Caldwell* makes clear that before a court can treat a jury decision as binding, the jury must be correctly instructed as to its sentencing responsibility. This means that 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. This did not happen in Dailey's case. Instead, "the jury instructions in [Dailey's] case[s] impermissibly diminished the jurors' sense of

responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Sotomayor, J., dissenting). The error was further compounded on direct appeal when this Court struck two aggravating circumstances and then still treated the jury's advisory recommendation as binding.

The issue here is not whether Dailey's jury was properly instructed at the time of his capital trial, but instead, whether *today* the State and this Court can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly (and unconstitutionally) instructed otherwise. The United States Supreme Court, in *Hurst v. Florida*, warned against that very thing. The Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of 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, 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.").

Because there was no special verdict form utilized in Dailey's case, all this Court can do is speculate that all of his jurors found all the necessary factors in order to impose death, since the only thing before this Court is a generalized verdict form. Dailey was denied his right to a jury finding of fact. Whether that error is harmless cannot be decided based on reference to an advisory panel which made no such findings of fact and which, beyond the mere recommendation, shows no unanimity on any particular aggravating factor. The advisory panel was instructed that the responsibility for determining the appropriate sentence lied with the trial court, and such reliance violates the Eighth Amendment based on *Caldwell*.

The circumstances under which Dailey's 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.

CONCLUSION

This Court should hold that the *Hurst* decisions are retroactive to Dailey, vacate Dailey's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Christina Pacheco, Christina.Pacheco@myfloridalegal.com & cappapp@myfloridalegal.com; on this 29th day of May, 2018.

Respectfully submitted,

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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 G

THE COURT: All right. Thank you very much.

Members of the jury, let me ask you, did anybody during the lunch hour attempt to talk you, to influence you about this case?

JURY PANEL: (All indicating negatively.)

THE COURT: Did you discuss this among yourselves at this time?

JURY PANEL: (All indicating negatively.)

THE COURT: Did any of you read anything in the newspaper, see anything on the television, hear anything on the radio?

JURY PANEL: (All indicating negatively.)

THE COURT: Thank you all.

Members of the jury, at this point in time, the State has rested their case in phase two and Defense has rested their case in phase two.

We will now move into the closing argument portion of phase two. The State will present their argument and then the Defense will present their argument.

Both sides have equal time.

State, are you ready to proceed?

MR. HEYMAN: Yes, your Honor. May it please the Court, counsel.

Good afternoon, ladies and gentlemen. Back in

voir dire, way back last Tuesday, we talked about this proceeding being in two parts. We are now at the second part of the penalty phase, where shortly you will go back and deliberate concerning your recommendation of the appropriate sentence for James Dailey in this case.

Two concepts remain. They were stressed to the you in the guilt plase. Number one is your decision must be based only on the evidence presented both in the first portion of this trial and the additional evidence that you have heard this afternoon and this morning.

The second concept that remains is the reminder that you must follow the law, that you should apply the law as will be read to you by Judge Penick in the second portion of your deliberations.

One concept no longer applies. That's the concept that the burden of proof is on that table alone, that the burden of proof remains only with the State, for in this second phase, the burden also applies to the Defendant's lawyers that they must also come forward with competent evidence to establish what is called mitigating circumstances in this case. You will be instructed that this is once again a two part process.

First of all, you can look to what the State has presented. You should determine whether the State has convince you beyond a reasonable doubt that aggravating circumstances existed in this case. You will be told that there are legal, aggravating circumstances to which you are to confine your consideration. You will be instructed and you will be told that they are five aggravating circumstances which I will go over with you shortly and that's the first portion of your consideration. Go back, see if they are aggravating factors which would justify the imposition of the penalty of death. And if and only if you determine that there are aggravating fators, you are then instructed to determine whether there are what are called mitigating circumstances and you are to determine whether or not you are reasonably convinced that there are mitigating circumstances in this case which outweigh the aggravating circumstances which you obviously have already found.

You will be instructed that there are some required mitigating factors and they are other factors which you can consider regardless, depending on the evidence as you see fit. Be reminded, this is not a case of balancing the numbers themselves. State gets two aggravating circumstances, Defendant shows two.

That's a tie. That's not a correct statement of the law.

You are to look to the quality of the evidence to determine whether or not, regardless of the amount of mitigating factors you find, whether they outweigh the aggravating circumstances. Ladies and gentlemen, let me tell you right now, there is only aggravation in this case. There is no mitigation whatsoever.

The first aggravating circumstance the State has established is that this offense was committed in a cold and calculated manner, that it was done not merely by stabbing this girl 48 times, but that the State has established she was also beaten about the face, that she was choked and she was also drowned. Think of that sequence of events. They take the girl from the car. James Dailey begins to stab her, stabs her in the neck, perhaps punches her in the face, perhaps stabs her in the chest and stabs her right through her hand at least seven times. Look at those photographs once again and I refer you specifically to the stab wounds in the back of her neck. Perhaps she was stabbed not only through the head but back into her neck as she was trying to defend herself from the stabbings of this man who stands before you.

This reveals only one thing, ladies and

gentlemen. This is a constant, determined effort to take the life of Shelly Boggio. They must have had the knife when they left the car. She was stabbed. You heard the physical evidence that she was stabbed and then taken to the waterfront. Remember where the pools of blood were located. She was stabbed in at least two separate positions on that strip of land on Indian Rocks Beach.

Remember the statement of Paul Skalnik that she was then held under. He didn't know what that meant. He obviously just meant held under the water and remember the testimony of Oza Shaw and remember the testimony of Gayle Bailey, highly consistent with showing that man coming home at 2:30, 3:00 in the morning, close to time that Joan Wood said the death occurred, with wet pants, with no shirt and perhaps no shoes.

All of this evidence points to one fact, that James Dailey did whatever was necessary to take the life of that 14 year old child. When stabbing didn't do it, he took her to the water and held her under until she drowned. Cold, calculated and highly premeditated manner of killing.

The second aggravating factor that you can consider is that that murder, premediated murder, was

committed during the commission or attempted commission of a sexual battery. What evidence do you have of that effect? You already heard and I expect to hear it again, that there was no semen, that there was no analysis of any fibers such as that.

But what did Detective Halliday who was qualified as an expert in rape investigations and homicide investigations tell you. You just need to use your common sense. The girl was found naked. She was found naked in the waterway. Especially look to her jeans and look to where her shirt was found. A 14 year old girl's jeans do not come off during a struggle alone if the intent was merely to kill her. She can just as easily have been killed with her jeans remaining on her. They were taken off for a purpose. Jeans do not come off during a struggle.

How about the shirt that I had Detective Halliday show you again today? He indicated that he looked at the body and he also looked at the shirt and that, yes, they are stab wounds through the shirt which conform to the stab wounds on her body but there are also other stab wounds which did not conform with the shirt. What does that lead you to conclude? Was she stabbed when she was still clothed? Were her clothes taken off and then was she sexually assaulted

after she had already been stabbed numerous times.

This crime was committed during the commission of a sexual battery or at least an attempt and that is an aggravating factor from which there can be no reasonable doubt.

The third aggravating factor you can consider is that this murder was committed to eliminate a witness. This murder was committed to make sure that man and Jack Pearcy got away undetected or at least as much as they can. Pablo's question to James Dailey in the jail, why didn't you just overpower her? You're a big guy; she was 14 years old. Why didn't you overpower her? I'll will tell you why. Because Stacey said that Shelly knew them both; that Shelly had been with them before and she, quote, trusted them.

Also the evidence showed that numerous people happened to have seen both of these individuals with the victim that night. Oza Shaw, Gayle Bailey. They had been out to a bar, dancing. People had seen them together. And she knew both of them.

She was killed to make sure that they got out of town undetected; that it was only through good detective work that the Defendants were ultimately captured. And remember the Defendants statements in the jail to Mr. Leitner. Pearcy's the only one who

can put me there. The only other witness who would have put him there is dead. And what did they do immediately upon killing her, throwing her body in the intracoastal to perhaps sink or to perhaps float away? After they took her shirt and threw that in the water, after they took her jeans and threw them twenty feet into the waterway, they went home. They washed the car. They went to Miami and they split up.

I believe you can conclude that the panties also would have gone in the water but they were black. They are in the tall grass and they could not be seen. This man, together with Jack Pearcy, took every step he could to make sure that he got away with this crime, leaving as little physical evidence as possible at that crime scene.

This murder was committed in order to eliminate a witness and that witness is Shelly Boggio.

You will also hear that you can consider as an aggravating factor that the Defendant was convicted of a prior violent felony. You will be able to take back in your deliberations a certified copy of a judgment and sentence from Tucson, Arizona from 1979 which establishes that the Defendant was convicted of an aggravated battery back in 1979, violent crime, violent felony, which he pled guilty and served time

in jail for and was sentenced on. That factor, there can be no reasonable doubt concerning.

Finally, you will hear that you can consider whether this offense was done in a heinous, atrocious or cruel manner. I save this one for last because there can be no doubt. There can be no doubt when you look at those photographs the type of suffering, the type of realization Shelly Boggio had of her impending death during the course of events back on May 5 and 6 of 1985. As Paul Skalnik said, the Defendant indicated, no matter how many times I stabbed her, she just wouldn't die. Joan Wood said she may have been conscious through most of the stabbings. Joan Wood indicated the stab wounds did not kill her. In time, she may have bled to death but the ultimate cause was drowning.

This man stabbed her 31 times or at least took part in those 31 stab wounds, threw her in the water in order to eliminate her body. She comes to life. What's needed now at this point? He goes out to the water and holds her under until she's dead, until she drowned. Joan Wood indicated the chloride level in her heart, the physical evidence that establishes that the cause of death was drowning. And she may have been conscious up until the time she drowned. Think

of that, ladies and gentlemen.

You heard from Detective Halliday that he has been a detective in the Crimes Against Persons Division for many years, that he has investigated over a hundred homicides, many of them stabbings, many including sexual battery. A person only has to have a minimal amount of human compassion to look at those photographs and determine this was a heinous, atrocious and cruel death.

But consider the testimony of Dr. Wood and Detective Halliday. Seeing violent death is written right into their job description and they say it's the worse murder, the worse stabbing, the worse homicide they have ever seen. There can be no doubt that this death was committed in a cruel, atrocious and heinous manner.

Once you have determined that there are aggravating factors, you must look to what the Defense has put on, what the Defendant's lawyers have presented in order to show there are mitigating factors in this case. They must reasonably convince you that these mitigating factors exists.

I am going to say they have proven none of them, no evidence whatsoever to any of these and if there had been, you would have heard it.

Number one, 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 by alcohol or drugs. There is no evidence to that effect. You heard he had a drinking problem back in the military, number of years earlier. You heard nothing which establishes that on the night May 5 and May 6, he was so under the influence that did he not appreciate what he was doing. That must be rejected out of hand.

Secondarily, that the Defendant was an accomplice in the offense for which he is to be sentenced but the offense ws committed by another person and the Defendant's participation was relatively minor.

Mr. Dailey's statements, so many times times I stabbed her, she just wouldn't die. Remember James Dailey's pants being wet. Remember the description of Jack Pearcy, that he was dressed exactly as he had been earlier that evening and he was not wet. This man was a major participant in this crime. There is no mitigation under that circumstance.

Number three, the Defendant acted under extreme duress or under the substantial domination of another person. Once again, no evidence of that whatsoever.

Number four, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. No evidence whatsoever and if there had been, you would have heard it.

Number five, and this is a catch all, any other aspect of the Defendant's character or record or any other circumstance of the offense. Basically use your judgment. Listen to the evidence or lack of evidence, see if there is some reason to mitigate against those five aggravating factors that you have already determined if you are now at this stage.

The Defense attorneys put on four witnesses. They put on the Defendant's ex-wife, put on his ex-wife's new husband and they put on his 18 year old daughter and they also called Mr. Dailey's mother. You heard his lawyer present a picture of Mr. Dailey that he was a good husband and father, that he had an alcohol problem back -- dating back to the military; that he saved two people from drowning in high school twenty years ago; that he was stabbed eleven times twenty years ago. What has he done since? If there had been significant events which lead you to believe that he had lead a productive life, you would have heard them. Compare the fact that he saved or is

alleged to have saved two people from drowning twenty years ago with the man who came in to that home on May 6th, 1985, after having drowned a 14 year old child. Compare a man who was stabbed 11 times twenty years ago with the body of Shelly Boggio which bears 48 different stab wounds to the neck, through the hand, to the back.

The Defense presented a picture of the Defendant who was a recruiter's dream, that he looked good on a billboard poster. I have perhaps no doubt twenty years ago that may have been true.

You are to consider that in light of the events of May 5th and May 6th, 1985. A recruiter's dream. Looked good on a billboard. Picture the man holding that knife. Picture the man stabbing that girl who stared at him and would not die.

Does that outweigh the actions that he took back in May of 1985? Of course not. Compare the James Dailey of May 5th, 1985 and May 6th, 1985 with the person who took the life of a 14 year old child who at the time was one year younger than his own daughter. Compare those two.

Other things presented by the attorneys, he played putt-putt golf; he played the guitar. Perhaps this was the same guitar that Jimmy D through over his

sholder as he walked out of town in Miami May 6th, 1985, after stabbing and drowning and choking and beating a 14 year old child. Does that outweigh the aggravating circumstances for which there can be no doubt? Of course not.

Finally, you heard from Mrs. Davies, the mother of James Dailey. She indicated that she loved her son and he was, at one time, her favorite; that he was in the Little Abner production in high school.

It's a truism, folks. A mother's love is constant in the face of all evidence to the contrary and that's a truism and that's something that we all understand. A mother's love continues in the face of any evidence which shows that it is not deserved.

Show compassion for Mrs. Davies. Feel for her as a mother. Show no compassion for James Dailey who took the life of a 14 year old child.

Folks, just as Shelly Boggio cried out that night May 6th, early morning hours of May 6th, 1985, just as she cried out through the countless stabbings in her hand, in her chest, through the beating that she endured, just as she cried out, the law in the State of Florida cries out to you for a recommendation of death in this case because that's what the evidence shows, and that's what the law also indicates in this

case.

The two things that you are constantly reminded to do, base your decision on the evidence and look to the law as it's applied.

There are five aggravating factors. There can be no mitigation in this case. There is no excuse for what happened back on that strip of land back on May 5th and 6th, 1985. None. The Defendant has put on nothing that establishes those five mitigating circumstances that I read to you and he has put on nothing to establish any other reason why you should show in your recommendation any mercy whatsoever for James Dailey. By his actions on May 5th and 6th, 1985, James Dailey exhibited that he has no conscience, that he he has no soul, that he is an amoral, calculating, cold-blooded killer.

James Dailey has lived on this earth for 41 years. Shelly Boggio only lived 14. Her life had just begun. Life is really too fleeting when lived to the fullest but what has James Dailey done with his life? According to the evidence that you have heard today, he has done nothing in the between years since the days of high school youth. What has he done? I will tell you exactly what he has done with his life. He has used his life to snuff out the life of a 14

year old child and by that act, he has forfeited his right to live any more.

Ladies and gentlemen, I ask you to look at the evidence. I ask you to listen very carefully to the law that Judge Penick will read to you very shortly. I ask you to find that there are ample aggravating circumstances that you must be convinced beyond a reasonable doubt as to each one or as to many as you feel appropriate, that there is no mitigation in this case.

I ask you to listen carefully to the instructions. You will hear that your vote must be by a majority in order to recommend death. And I believe that Judge Penick will read to you the fact while this may be accomplished on one ballot, that you think very carefully in making that decision. Think carefully to the evidence that you have heard in this case. Remember the actions of James Dailey in taking the life of that 14 year old child. Remember that he has a prior violent felony. Remember this was a cold calculated act in order to snuff out Shelly Boggio's life in order to eliminate her as a witness. Balance it against what you have heard as presented by the Defense attorneys.

There is no comparison whatsoever, ladies and

gentlemen. I ask you carefully consider what you have heard and once again follow the law, the law which in this case -- the law which in this case, based upon the evidence, cries out for a recommendation of death.

Thank you.

THE COURT: Mr. Heyman, thank you very much.

THE COURT: Defense, are you ready to proceed. Mr. Andringa, sir.

MR. ANDRINGA: Please the Court, ladies and gentlemen.

Let me say at the outset if my voice quivers at times, it's nerves; my voice cracks at times, it's emotion, and I don't do that to curb your attention nor your sympathy. It's just there's been little in my life to prepare for a moment just as this. I am in awe at the moment. I would hope that my eloquence or lack of eloquence certainly would not persuade you in your decision just I would hope Mr. Heyman's eloquence would not sway you over the fact -- at the reason for being here.

Mr. Heyman said they've proved beyond a reasonable doubt, and recall that is the standard here, to show aggravating circumstances that has to be shown and establish beyond a reasonable doubt just as though the case was itself earlier, in which you found

each of those aggravating factors has to be.

So, when he tells you that first, it was cold and calculated, does it not appear an act of passion as opposed to calculated.

When the Legislature set out the criteria as cold and calculated, they were talking about contract killing, something you reflect on for a period of time as opposed to something that happened, not just premeditation. You were told premeditation takes place ever so briefly. This is extra premeditation in order for it to be an aggravating factor and they talked at times about two minutes and that was the best estimate from their own witnesses and is that the kind of extra premeditation which makes it cold and calculated, to be an aggravating circumstance so as to justify a recommendation of death.

Secondly, he said there has surely got to be a sexual battery. When ya'll deliberated, I believe, it was Saturday, had the only charge been here a sexual battery, James Dailey you're charged with sexual battery, you would have to go back and deliberate and find him guilty or not guilty of sexual battery. I submit to you, you would have no evidence.

Now, they have attempted to boot strap that now through Detective Halliday but if you think about

Appendix H

THURSDAY
30TH JUNE 8
CH

PENALTY PROCEEDINGS F. S. 921.141

1. Ladies and Gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree.

CRC 85-07084
STATE OF FLORIDA
VS.
JAMES DAILEY

2. The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.

The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Read to jury
Colt. were present too!
Tuesday
30th June 1987
@ 1135 hours

FILED
JUN 30 1987
KARLEEN F. De BLAKER
CLERK CIRCUIT COURT
By Kathryn Davidson

Judge Powell

CRC 85-07084

STATE OF FLORIDA
VS.
JAMES DAILEY

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. 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 the evidence that has been presented to you in these proceedings.

F.S. 921.141(5)

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

1. The crime for which the defendant is to be sentenced was committed while he was engaged in sexual battery or attempted sexual battery;

2. The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

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;

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

5. The Defendant was previously convicted of a felony involving the use or threat of violence to the person.

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.

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. 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 the evidence that has been presented to you in these proceedings.

F.S. 921.141(5)

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

1. The crime for which the defendant is to be sentenced was committed while he was engaged in sexual battery or attempted sexual battery;

2. The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

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;

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

5. The Defendant was previously convicted of a felony involving the use or threat of violence to the person.

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.

20

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. 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 by alcohol or drugs.

2. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.

3. The defendant acted under extreme duress or under the substantial domination of another person.

4. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

5. Any other aspect of the defendant's character or record, and any other circumstance 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.

30.

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. Your decision may be made by a majority of the jury.

The fact that the determination of whether a majority of 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 JAMES DAILEY 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 JAMES DAILEY.

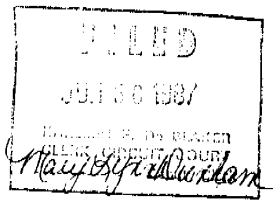
On the other hand, if by six or more votes the jury determines that JAMES DAILEY should not be sentenced to death, your advisory sentence will be:

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

You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned to the court.

CIRCUIT COURT, PIENLLAS COUNTY, FLORIDA

CIRCUIT CRIMINAL NO. CRC85-7084CFANO-D



STATE OF FLORIDA

VS.

JAMES DAILEY

A majority of the jury, by a vote of 12-0 advise and recommend to the court that it impose the death penalty upon JAMES DAILEY.

So say we all,

Jeffrey J Bush
FOREMAN

DATED: June 30 1987

Appendix I

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

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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

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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.,

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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

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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

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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 circumstance~~s)~~ 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.

7.11~~1~~0 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; (43) whether mitigating circumstances are proven by the greater weight of the evidence; (54) whether the aggravating factors outweigh the mitigating circumstances; and (65) 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 ~~everya~~ 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** (decedent'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** (decedent).

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.