IN THE SUPREME COURT OF THE STATE OF FLORIDA

CARY MICHAEL LAMBRIX,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. SC16-8
Lower Tribunal No:
221983CF000012CFAXMX

CARY MICHAEL LAMBRIX,
Appellant

v.

JULIE L. JONES,
Etc.
_____/

CASE NO. SC16-56
Lower Tribunal No:
221983CF000012CFAXMX

MOTION TO RELINQUISH JURISDICTION IN ORDER TO FILE A RULE 3.851 MOTION BASED ON *HURST V. FLORIDA*, No. 14-7505, 2016 WL 112683 *3 (2016)

APPELLANT, **CARY MICHAEL LAMBRIX**, by and through undersigned counsel, and pursuant to this Court's holding in *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005), respectfully requests that this Honorable Court relinquish jurisdiction in the above-styled cause to the Circuit Court of the Twentieth Judicial Circuit, in and for Glades County, Florida, in order to allow the Appellant to file a Rule 3.851 motion based on new law. As grounds in support of this motion, Mr. Lambrix alleges:

A. Background

Mr. Lambrix is an indigent death-sentenced inmate. Following the affirmation of both the convictions and sentences upon direct appeal, Mr. Lambrix's case has had an extensive postconviction history, as was fully set forth in his initial brief currently pending before this court and in the attached Rule 3.851 motion as Appendix 1. Mr. Lambrix refers this Court to that recent comprehensive summary of Mr. Lambrix's postconviction history which references this Court's disposition of all claims presented and the disposition of all prior claims.

Mr. Lambrix has an under warrant habeas corpus petition, SC16-56, pending before this Court. The day after it was filed along with his initial brief, the United States Supreme Court issued an opinion in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 *3 (2016). The pending state habeas corpus petition includes an issue predicated in part on the outcome of *Hurst*. In light of the opinion in *Hurst*, in an Order of January 12, 2016 this Court ordered both the Respondent and the Petitioner to "address the retroactivity of *Hurst*, the effect of *Hurst* in light of the aggravating factors found by the trial court in Lambrix's case, and whether any error in Lambrix's case is harmless." In a supplemental Order on January 19, 2016, in response to Petitioner's motion for a two day extension of time to file the replies, this Court allowed Petitioner two additional days, until Noon on Friday, January 22,

2016 to file the reply to the states response to the habeas corpus petition and to the State's answer brief.

The petition includes two additional issues: the failure of the trial court in the Twentieth Judicial Circuit to disqualify itself and a related Supreme Court certiorari grant in *Terrance Williams v. Pennsylvania,* No. 15-5040 (U.S. June 12, 2015) and the clemency process in Mr. Lambrix's case which terminated with the November 30, 2016 signing of a second death warrant in his case. The pending proceedings in this Court under warrant include briefing in SC16-8. The claims therein are based upon ineffective assistance of trial counsel predicated on a total breakdown of the attorney client relationship pursuant to *United States v. Cronic*, 466 U.S. 648, 659-60 (1984)*;* denial of a motion below for DNA testing pursuant to Fla. R. Crim. P. 3.853; public records issues pursuant to Fla. R. Crim. P. 3.853, and a claim predicated on *Lackey v. Texas*, 514 U.S. 1045 (1995).

B. Request for Relinquishment to the Circuit Court

Today, Mr. Lambrix is filing the instant Motion to Relinquish Jurisdiction in this Court, urging this Court to relinquish jurisdiction to allow for Mr. Lambrix to file a successive Rule 3.851 motion based on the new federal law enunciated in the United States Supreme Court's January 12, 2016 holding in *Hurst v. Florida,* No. 14-7505, 2016 WL 112683 *3 (2016). The Court held, without qualification, that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing

scheme unconstitutional." *Id*. Specifically, the Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

The U.S. Supreme Court identified in *Hurst* what those critical factfindings are, leaving no doubt as to how the statute must be read under the Sixth Amendment:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death**." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must **find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.

Hurst, 2016 WL 112683 at *6 (emphasis added) (citations omitted). Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily defined facts in addition to the verdict unanimously finding the defendant guilty of first degree murder. The additional statutorily defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the

aggravating circumstances." *See* § 921.141(3); *Hurst*, 2016 WL 112683 at *6.[1] *Hurst* identified these findings as the operable findings that must be made by a jury.[2]

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[1] In *Proffitt v. Florida*, the United States Supreme Court, when explaining the mechanics of Florida's capital sentencing scheme, discussed these same statutorily defined factual issues:

> At the conclusion of the hearing the jury is directed to consider "**(w)hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . (b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death.**" ss 921.141(2)(b) and (c)(Supp.1976 1977). The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "(i)n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
>
> The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) (t)hat sufficient (statutory) aggravating circumstances exist . . . and (b) (t)hat there are insufficient (statutory) mitigating circumstances . . . to outweigh the aggravating circumstances." s 921.141(3) (Supp. 1976 1977).

428 U.S. 242, 248-50 (1976) (citations omitted).

[2] The Florida Supreme Court in *Randolph v. State*, 463 So. 2d 186, 193 (Fla. 1984), recognized that the sufficiency of the aggravating circumstances under the statute was a question of fact for the sentencing judge. After striking one aggravating circumstance and merging two other aggravating circumstances, the Florida

The basis for that requirement is that the findings of fact statutorily required to render a defendant death eligible must be considered to be elements of the offense, separating first degree murder from capital murder under Florida law, and forming part of the definition of the crime of capital murder. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "**any fact** (other than prior conviction) **that increases the maximum**

Supreme Court vacated the death sentence and remanded to the sentencing judge for reconsideration. The *Randolph* Court explained:

> We conclude that Randolph is entitled to a reconsideration of his sentence in light of our determination that only one valid aggravating circumstance was present in this case rather than the aggravating circumstances found by the trial judge. **One valid aggravating circumstance may be sufficient to support a death sentence** in the absence of at least one overriding mitigating circumstance. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) . . . , however, went on to stress that the capital sentencing procedure
>
> > is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but **rather 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.
> >
> > *Id*. at 10.

(emphasis added). The dissent in *Randolph* objected to the remand, asserting that "[t]he majority seems to hold that persons should not be sentenced to death upon one aggravating circumstance." *Randolph*, 463 So. 2d at 195 (Adkins, J., dissenting).

penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt'" to state sentencing schemes under the Fourteenth Amendment) (emphasis added).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court applied the *Apprendi* rule to the Arizona capital sentencing scheme and found it violated the Sixth Amendment.[3] The Supreme Court in *Hurst* found that the Florida Supreme Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), in considering the potential impact of *Ring v. Arizona*, 536 U.S. 584 (2002) on Florida's capital sentencing

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[3] As the Arizona Supreme Court explained in *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001), the factual determination required by Arizona law before a death sentence was authorized was the presence of at least one aggravating factor:

> And even then [after a sentencing hearing before the trial judge] a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13–703.E ("the court . . . **shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated**"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes **a factual finding that at least one aggravating factor is present**.

(emphasis added). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

scheme, had erroneously failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for the Florida Supreme Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989), which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." The Florida Supreme Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 2016 WL 112683 at *8 (emphasis added).[4]

[4] It follows that the Florida Supreme Court's decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) was also wrong to conclude that Florida's capital sentencing scheme did not violate *Apprendi*. In *Mills*, the jury had recommended a life sentence, but the judge overrode the recommendation, throwing out whatever implicit factfinding might have been said to accompany that recommendation, and imposed a death

The 8-1 decision in *Hurst v. Florida* is a tectonic shift in Florida capital law.[5] *Hurst* can also be described as a paradigm shift in our understanding of the constitutionality of Florida's death penalty scheme. *Hurst* establishes not only that

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sentence instead. Yet, the Florida Supreme Court rejected Mr. Mills' claim that his death sentence stood in violation of *Apprendi*:

> Mills argues that *Apprendi* overruled *Walton* and relies upon the five to four split in the Court. Four justices stated in dissent that *Apprendi* effectively overruled *Walton*, and another justice in his concurring opinion stated that reconsideration of *Walton* was left for another day. With the majority of the justices refusing to disturb the rule of law announced in *Walton*, it is still the law and it is not within this Court's authority to overrule *Walton* in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Mills v. Moore, 786 So. 2d at 537 (citations omitted).

[5] Not only was the Florida Supreme Court's decision in *Bottoson v. Moore* expressly overturned, the United States Supreme Court expressly held that its decisions in *Hildwin v. Florida* and *Spaziano v. Florida* had not survived *Apprendi v. New Jersey* and *Ring v. Arizona*. *Hurst v. Florida* implicitly overturned *Mills v. Moore* and every subsequent Florida Supreme Court decision relying upon either *Mills v. Moore* or *Bottoson v. Moore*, it also overturned every Florida Supreme Court decision resting upon *Spaziano v. Florida* and/or *Hildwin v. Florida*. The tectonic shift in Florida capital law engendered by *Hurst v. Florida* is comparable only to that which was created by *Furman v. Georgia*, 408 U.S. 238 (1972). Indeed, not since *Furman* has the Florida capital sentencing scheme been declared unconstitutional.

our most basic assumptions about the constitutional integrity of Florida's system was wrong, but necessarily opens up new approaches to understanding what is, and is not, unconstitutional in what remains. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance and jurisprudential upheaval. *See Hughes v. State,* 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment.").

For these reasons Mr. Lambrix requests that this Court relinquish jurisdiction under the procedure set out by this Court in *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005) so that Mr. Lambrix may now file a Rule 3.851 motion below based on the new law described above.

In *Tompkins v. State,* this Court set out the proper procedure for preserving a claim based on newly discovered evidence while a case is on appeal:

> We recognize that due to this Court's denial of Tompkins' motion to relinquish, a procedural dilemma now arises because Tompkins is time-barred from filing a new postconviction motion raising his newly discovered evidence claims. *See Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) ("Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence."). Accordingly, although we affirm the trial court's order, we

> conclude that Tompkins should be permitted 60 days to refile his successive postconviction motion nunc pro tunc to February 5, 2003, the date his prior motion was filed in the trial court. To avoid this procedural dilemma in the future, we conclude **if an appeal is pending in a death penalty case and this Court denies a motion to relinquish jurisdiction for the trial court to consider a new claim, the trial court should hold any successive postconviction motion in abeyance until the appeal process is completed**.

894 So. 2d 857, 859-60 (Fla. 2005) (emphasis added).

Counsel for Mr. Lambrix contacted Assistant Attorney General Scott A. Browne to ascertain the State's position on the above-styled motion. The Appellee opposes the instant motion.

WHEREFORE, Mr. Lambrix respectfully requests that this Honorable Court grant his motion and relinquish jurisdiction to the circuit court for the reasons stated.

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Respectfully submitted,
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COUNSEL FOR MR. LAMBRIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via email service at *warrant@flcourts.org* this 22nd day of January 2016.

/s/William M. Hennis, III
WILLIAM M. HENNIS III
Fla. Bar No.: 0066850
Litigation Director CCRC-South

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR GLADES COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case No.: 83-12-CF

EMERGENCY CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
FEBRUARY 11, 2016 AT 6:00 P.M.

v.

CARY MICHAEL LAMBRIX,

Defendant.
_____/

SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO RULE 3.851 WITH SPECIAL REQUEST FOR LEAVE TO AMEND

COMES NOW THE DEFENDANT, CARY MICHAEL LAMBRIX, by and through undersigned counsel, and respectfully requests that this Court grant an order vacating his conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. In support thereof, Mr. Lambrix respectfully submits the following:

INTRODUCTION

On January 12, 2016, the United States Supreme Court rendered its decision in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016). The Court held, without qualification, that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Id*. at *3. Specifically, the Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id*. The U.S. Supreme Court identified in *Hurst* what those critical factfindings are, leaving no doubt as to how the statute must be read

under the Sixth Amendment:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death**." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at *6 (emphasis added) (citations omitted). Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily defined facts in addition to the verdict unanimously finding the defendant guilty of first degree murder. The additional statutorily defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 2016 WL 112683 at *6.[1] *Hurst* identified

[1] In *Proffitt v. Florida*, the United States Supreme Court, when explaining the mechanics of Florida's capital sentencing scheme, discussed these same statutorily defined factual issues:

> At the conclusion of the hearing the jury is directed to consider "**(w)hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . (b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death.**" ss 921.141(2)(b) and (c). The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "(i)n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
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> The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its

these findings as the operable findings that must be made by a jury.[2]

The basis for that requirement is that the findings of fact statutorily required to render a defendant death eligible must be considered to be elements of the offense, separating first degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)

> findings upon which the sentence of death is based as to the facts: (a) (t)hat sufficient (statutory) aggravating circumstances exist . . . and (b) (t)hat there are insufficient (statutory) mitigating circumstances . . . to outweigh the aggravating circumstances." s 921.141(3) (Supp. 1976 1977).

428 U.S. 242, 248-50 (1976) (citations omitted).

[2] The Florida Supreme Court in *Randolph v. State*, 463 So. 2d 186, 193 (Fla. 1984), recognized that the sufficiency of the aggravating circumstances under the statute was a question of fact for the sentencing judge. After striking one aggravating circumstance and merging two other aggravating circumstances, the Florida Supreme Court vacated the death sentence and remanded to the sentencing judge for reconsideration. The *Randolph* Court explained:

> We conclude that Randolph is entitled to a reconsideration of his sentence in light of our determination that only one valid aggravating circumstance was present in this case rather than the aggravating circumstances found by the trial judge. **One valid aggravating circumstance may be sufficient to support a death sentence** in the absence of at least one overriding mitigating circumstance. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) . . . , however, went on to stress that the capital sentencing procedure
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> > is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but **rather 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.
> >
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(emphasis added). The dissent in *Randolph* objected to the remand, asserting that "[t]he majority seems to hold that persons should not be sentenced to death upon one aggravating circumstance." *Randolph*, 463 So. 2d at 195 (Adkins, J., dissenting).

(applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "**any fact** (other than prior conviction) **that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt**" to state sentencing schemes under the Fourteenth Amendment) (emphasis added).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the U.S. Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment.[3] The U.S. Supreme Court in *Hurst* found that the Florida Supreme Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), in considering the potential impact of *Ring v. Arizona*, 536 U.S. 584 (2002) on Florida's capital sentencing scheme, had erroneously failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for the Florida Supreme Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989), which held that the Sixth Amendment "does not require that the

[3] As the Arizona Supreme Court explained in *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001), the factual determination required by Arizona law before a death sentence was authorized was the presence of at least one aggravating factor:

> And even then [after a sentencing hearing before the trial judge] a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13–703.E ("the court . . . **shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated**"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes **a factual finding that at least one aggravating factor is present**.

(emphasis added) (alteration in original). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

specific findings authorizing the imposition of the sentence of death be made by the jury." The Florida Supreme Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 2016 WL 112683 at *8 (emphasis added).[4]

[4] It follows that the Florida Supreme Court's decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) was also wrong to conclude that Florida's capital sentencing scheme did not violate *Apprendi*. In *Mills*, the jury had recommended a life sentence, but the judge overrode the recommendation, throwing out whatever implicit factfinding might have been said to accompany that recommendation, and imposed a death sentence instead. Yet, the Florida Supreme Court rejected Mr. Mills' claim that his death sentence stood in violation of *Apprendi*:

> Mills argues that *Apprendi* overruled *Walton* and relies upon the five to four split in the Court. Four justices stated in dissent that *Apprendi* effectively overruled *Walton*, and another justice in his concurring opinion stated that reconsideration of *Walton* was left for another day. With the majority of the justices refusing to disturb the rule of law announced in *Walton*, it is still the law and it is not within this Court's authority to overrule *Walton* in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Mills v. Moore, 786 So. 2d at 537 (citations omitted).

The 8-1 decision in *Hurst v. Florida* is a tectonic shift in Florida capital law.[5] *Hurst* requires a global paradigm shift in our understanding of the Sixth Amendment aspects of Florida's death penalty scheme. *Hurst* establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong. It necessarily opens up new approaches to understanding what is, and is not, unconstitutional in what remains of that scheme. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance and jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment.").

At Mr. Lambrix's trial, the jury was repeatedly informed that its penalty phase verdict was merely advisory in nature (R. 1492-93, 1578, 1672, 1753, 2569). The jury was also instructed in conformity with Florida statutory law that the first fact question to be considered during the penalty phase deliberations was whether sufficient aggravating circumstances existed to justify the imposition of the death penalty:

> 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**

[5] Not only was the Florida Supreme Court's decision in *Bottoson v. Moore* expressly overturned, the U.S. Supreme Court expressly held that its decisions in *Hildwin v. Florida* and *Spaziano v. Florida* had not survived *Apprendi v. New Jersey* and *Ring v. Arizona*. *Hurst v. Florida* implicitly overturned *Mills v. Moore* and every subsequent Florida Supreme Court decision relying upon either *Mills v. Moore* or *Bottoson v. Moore*. It also overturned every Florida Supreme Court decision resting upon *Spaziano v. Florida* and/or *Hildwin v. Florida*. The tectonic shift in Florida capital law engendered by *Hurst v. Florida* is comparable only to that which was created by *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Appendices A, B, C, and D. Indeed, not since *Furman* has the Florida capital sentencing scheme been declared unconstitutional.

> **circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.** Your *advisory* sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(R. 2662) (bolding added). Mr. Lambrix's jury was then told that its advisory verdict did not need to be unanimous (R. 2665). After deliberations were completed, the jury foreman announced a death recommendation as to Count One by a vote of 10-2 and a death recommendation as to Count Two by a vote of 8-4 (R. 2680).

Thereafter, the trial judge conducted an independent sentencing as required by the Florida statute and imposed a sentence of death. In doing so, the judge—and the judge alone—made the findings of fact required under Florida law to make Mr. Lambrix eligible for a sentence of death. The proceedings that resulted in Mr. Lambrix's sentences of death were pursuant to a capital sentencing scheme that has been declared unconstitutional in *Hurst*. In violation of the Sixth Amendment, Mr. Lambrix's jury did not return a verdict finding the factual element or elements necessary to render Mr. Lambrix guilty of capital first degree murder and thus death eligible.

Hurst is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and thus principals of fairness dictate that *Hurst* be given retroactive effect. These principles of fairness were recently explained by the Florida Supreme Court in *Falcon v. State*. There, the Florida Supreme Court wrote:

> As this Court stated in *Witt*, "**[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**'" Here, if *Miller* is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the *Miller* decision was issued. The patent unfairness of

> depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively.

162 So. 3d 954, 962 (Fla. 2015) (citations omitted) (emphasis added). If the unfairness resulting from loss of liberty demands retroactive application then so too does loss of life. If the unfairness to juveniles in indistinguishable cases receiving different non-capital sentences is too great then so too is the unfairness of executing Mr. Lambrix while defendants with indistinguishable cases will receive the benefit of *Hurst* (and not be put to death under an unconstitutional death penalty scheme). Certainly, there will be capital defendants with "indistinguishable cases" whose death sentences will be vacated and will thus receive lesser sentences simply because their convictions and sentences were not final when the *Hurst* decision issued. Such patent unfairness and arbitrariness, certainly great enough to implicate the Eighth Amendment principles enunciated in *Furman v. Georgia*, requires that *Hurst* be applied retroactively.

Accordingly, Mr. Lambrix's claims for relief based upon *Hurst v. Florida* are properly presented in this Rule 3.851 motion. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991).

PROCEDURAL HISTORY

Appendix E.

LIST OF WITNESSES TO BE CALLED AT EVIDENTIARY HEARING

Appendix F.

GROUNDS FOR POSTCONVICTION RELIEF

CLAIM I

MR. LAMBRIX'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, MADE THE FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY WERE NOT OUTWEIGHED BY MITIGATING CIRCUMSTANCES, WHICH RENDERED MR. LAMBRIX DEATH ELIGIBLE.

I. The scope and nature of the unconstitutionality of Florida's death penalty scheme found in *Hurst v. Florida*

The United States Supreme Court did not equivocate in its *Hurst* holding: "We hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 at *3 (U.S. Jan. 12, 2016). It is not some discrete component of the scheme, but the statutory scheme itself that is infirm.

Nor did the Supreme Court equivocate about the reason: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at *3. Thus, the key to understanding what it is about Florida's death penalty that *Hurst* found unconstitutional is identifying "*each* fact necessary to impose" death. *Id*. (emphasis added). That those facts are not found by a jury is the Sixth Amendment violation.

If Florida juries were asked at the guilt phase to decide a long-recognized element of first degree murder, perhaps the premeditated design element, by a mere majority and in a verdict expressly described as advisory, and then the judge was required to make his own finding as to the element in order for a conviction to be entered, there would be no discussion to be had about whether the Sixth Amendment was violated. While under Florida's death penalty scheme the jury in this case was instructed on the need to determine whether sufficient aggravating circumstances existed to justify the imposition of a death sentence, the jury was told that its

verdict was only advisory and could be returned based upon a simple majority vote. It was left to the judge in his sentencing order to determine whether sufficient aggravating circumstances existed to justify a sentence of death. After *Apprendi*, after *Ring*, and after *Hurst*, there is no distinguishing between what happened at Mr. Lambrix's penalty phase and the hypothetical guilt phase at which a jury returned an advisory verdict as to an element or elements of a criminal offense by a simple majority vote.

a. Sufficient aggravating circumstances must exist, and not be outweighed by mitigating circumstances.

Under Florida law, "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id*. (citing Florida Statutes § 775.082(1)). Additional findings of fact must be made before death is available as a maximum sentence. *See* § 775.082(1). The Florida Legislature stated what those findings of fact are quite plainly in Florida Statutes § 921.141.

The language in § 921.141(2) is clear on its face. It requires the penalty phase jury to "deliberate and render an advisory verdict" as to "whether sufficient aggravating circumstances exist," and then as to whether the aggravating circumstances are outweighed by mitigating circumstances. Similarly, § 921.141(3), relevantly entitled "[f]indings in support of sentence of death," clearly provides that the judge, before imposing a death sentence, must first find that "sufficient aggravating circumstances exist," and then find that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances." Following the issuance of *Ring*, the State has argued for years that the advisory Subsection (2) jury finding made by a simple majority vote was the operable finding which satisfied the Sixth Amendment principle set forth in *Apprendi*. In *Hurst*, the U.S. Supreme Court ruled otherwise, citing to § 921.141(3), and stating that "Florida does not require the jury to make the critical findings necessary to impose

the death penalty" but "requires a judge to find these facts." *Hurst*, No. 14-7505, 2016 WL 112683 at *5. The Subsection (3) findings of fact are the operable findings for the Sixth Amendment analysis according to the 8-1 decision in *Hurst*. They are the critical findings that the Sixth Amendment requires juries to make, given Florida's statutory delineation of the facts to be found before a death sentence can be imposed. They are where Florida law has failed to require juries to render binding and unanimous verdicts beyond a reasonable doubt.

The holding of *Hurst* is that Florida's sentencing scheme is unconstitutional because it does not require juries to unanimously reach binding verdicts as to the existence of sufficient aggravating circumstances prior to death being imposed; instead, Florida law leaves it for sentencing judges to make findings justifying the imposition of death sentences.

In the wake of *Ring*, the State has alternatively argued that *Ring* merely requires the finding of a single aggravator to render a capital defendant in Florida death eligible. This argument rests on language from *Ring* often taken out of context. Contextualized more so than what is usually provided, the oft-cited quote from *Ring* is as follows:

> Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *See* 497 U.S., at 647–649, 110 S. Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S. Ct. 2348, the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609. The State has routinely relied on the first sentence quoted here, while ignoring the true import of the second sentence. The important aspect of the second sentence is its recognition that Arizona's aggravators operate as "the functional equivalent of an element of a greater offense." This language recalls that earlier in the *Ring* opinion the Supreme Court explained that the determination of what is the functional equivalent of an element of a greater

offense requires reference to—and an examination of—Arizona law: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602. As the Supreme Court explained in *Ring*, Arizona law provided that "a 'death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt.'" *Id*. at 597 (citing the Arizona law).

Nowhere in Florida's statute is it written that the mere finding of the presence of a single aggravating circumstance alone is a sufficient basis to justify the imposition of the greater punishment—a death sentence. The explicit requirement and plain language of the statute requires a finding of "sufficient aggravating circumstances" to be made by the judge before a death sentence can be returned. Fla. Stat. § 921.141(3)(a). A death sentence may not be imposed unless the judge finds sufficient aggravating circumstances exist to justify the imposition of a death sentence. This feature of Florida's scheme was specifically cited to and relied upon in the 8-1 *Hurst* opinion. *Sufficiency* is what Florida juries are instructed to consider when returning an advisory recommendation by a majority vote. *Sufficiency* is what judges are required to independently find before a death sentence can be imposed. *Sufficiency* is the required factual determination for the imposition of a death sentence. *Sufficiency* of the aggravating circumstances is a necessary element of capital first degree murder under Florida's capital sentencing scheme. *See Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty.").[6]

[6] The Florida Supreme Court's opinion in *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987), is also instructive in this regard. In *Proffitt*, only one valid aggravating circumstance was found to exist, the "in the course of a felony" aggravating circumstance. In vacating the death sentence and

In a pleading recently filed in the Florida Supreme Court in Mr. Lambrix's pending habeas proceeding, the State has once again argued that in Florida death eligibility arises from the finding of one aggravator. (Response Brief at 17, *Lambrix v. State*, No. SC16-56 (Fla. Jan. 15, 2016)) ("In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case."). The State does not cite or reference Florida's statute, which does not permit eligibility for a death sentence to arise from the finding of at least one aggravating circumstance. Instead, the State cites four post-*Ring* decisions from the Florida Supreme Court that bought into the State's erroneous reading of *Ring* and relied upon the erroneously decided decision in *Bottoson v. Moore*. As *Hurst* explained, the Florida Supreme Court in *Bottoson* was wrong in its reading and understanding of both *Ring* and *Apprendi*. Thus, the only support for the

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ordering the imposition of a life sentence, the Florida Supreme Court wrote: "To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty." *Id.* at 898. *See also Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984) ("Thus, we are left with only one valid aggravating circumstance. Rembert introduced a considerable amount of nonstatutory mitigating evidence, but the trial court chose to find that no mitigating circumstances had been established. Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here.").

Similarly, the Florida Supreme Court's analysis in *Provence v. State*, 337 So. 2d 783,786 (Fla. 1976), made it clear that the statutory list of aggravating circumstances was not talismanic. While two statutorily listed aggravating circumstances were technically present, the Florida Supreme Court determined that those circumstances not only should be merged, because they referred to the same aspect of the defendant's crime, they also arose from the underlying felony during which the homicide had occurred:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.

State's argument that merely the presence of one aggravator renders a defendant death eligible are decisions where the Florida Supreme Court misconstrued *Ring*.

Again, *Ring v. Arizona* was an Arizona capital case. At issue there was the intersection of the Sixth Amendment and Arizona's capital sentencing scheme, a scheme that expressly required a finding of "at least one aggravating circumstance." *Ring*, 536 U.S. at 593.[7] In *Ring*, the U.S. Supreme Court analyzed Arizona law under *Apprendi v. New Jersey*. *See Hurst*, No. 14-7505, 2016 WL 112683 at *5 ("In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule"). *Apprendi* requires that, without a jury finding of fact, a defendant cannot be "exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ring*, 536 U.S. at 586 (emphasis in original). In *Hurst*, the United States Supreme Court analyzed Florida's capital sentencing scheme under the *Apprendi* rule. In doing so, the Supreme Court in *Hurst* specifically quoted Florida's statutory law as to the factual determinations required before a death sentence can be imposed; i.e., there must at a minimum be a finding that sufficient aggravating circumstances exist. While both *Ring* and *Hurst* involved application of the *Apprendi* rule to a state's capital sentencing scheme, the

[7] The Arizona Supreme Court in *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001), identified the factfinding needed for death eligibility under Arizona law:

> And even then [after a sentencing hearing before the trial judge] a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13–703.E ("the court . . . **shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated**"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes **a factual finding that at least one aggravating factor is present**.

(emphasis added).

Arizona and Florida statutory requirements as to the facts necessary for death eligibility are decidedly different.

In *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005), the Florida Supreme Court, while writing about the potential impact of *Ring* in Florida, asserted that "[i]n *Ring*, the Supreme Court held that in capital sentencing schemes where aggravating factors 'operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.'" The Florida Supreme Court then asserted that "[i]n Florida, to recommend a sentence of death for the crime of first-degree murder, a majority of the jury must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance listed in the capital sentencing statute."[8] *Id*. However, neither Florida's statute nor the jury instructions given in Mr. Lambrix's case (or even the standard jury instructions adopted by the Florida Supreme Court) indicate that "a majority of the jury must find that that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance."[9] Instead, the

[8] Ignored by the Florida Supreme Court in making this assertion was its own jurisprudence that aggravating circumstances cannot repeat an element of the crime of first degree murder. *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990) ("To avoid arbitrary and capricious punishment, this aggravating circumstance 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' . . . Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder." (footnote omitted) (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). However, there are statutory aggravating circumstances that merely repeat an element of first degree murder and thus under *Porter* do not automatically render a capital defendant death eligible.

[9] Of course, if all that Florida's law required to be present to render a capital defendant death eligible was just one aggravating circumstance, then under *Apprendi* the indictment would have to allege the element, i.e the aggravating circumstance, that is alleged to render the defendant death eligible. Yet, the Florida Supreme Court pointedly rejected such a claim as meritless, because *Apprendi* does not apply in Florida:

> In claim three, Porter argues that his death sentence is unconstitutional as applied to him in light of *Apprendi v. New*

statute and the jury instructions indicate that the factual issue is whether sufficient aggravating circumstances exist to justify a death sentence.[10]

It is not entirely clear what the basis of the Florida Supreme Court's statement was in *Steele*. But, it certainly was not the statute, the jury instructions, or even the Florida Supreme Court's pre-*Ring* jurisprudence. The best explanation is that the Florida Supreme Court's statement was premised upon a belief that the Sixth Amendment analysis of Arizona law in *Ring v. Arizona* was a Sixth Amendment commandment for all capital sentencing schemes without reference to the specific factual finding mandated within a specific state's statute.[11] But the fact

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> *Jersey* . . . . Porter contends that under Florida law, a life sentence is the maximum penalty under section 775.082, Florida Statutes (1985), and therefore aggravating circumstances necessary for an enhancement to a death sentence are elements of the crime. Moreover, he contends that *Apprendi* requires that the aggravating circumstances needed to have been charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict. Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other *Apprendi* arguments.

Porter v. State, 840 So. 2d 981, 986 (Fla. 2003); *see also Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006).

[10] Indeed, the Florida Supreme Court gave a passing acknowledgment to the fact that neither Florida's statute nor its standard jury instructions require the jury to find an aggravating circumstance in order to render the defendant death eligible. *State v. Steele*, 921 So. 2d at 544 ("We begin to answer this question by reviewing the applicable law. Section 921.141 does not require jury findings on aggravating circumstances, and we have held that *Ring* does not require special verdicts on aggravators."). However, Florida's statute does require the jury to determine whether sufficient aggravating circumstances exist to justify a sentence of death. Yet, this was not referenced in *Steele.*

[11] Even though a majority of the Florida Supreme Court asserted Florida's capital sentencing was constitutional and not in violation of *Ring* or *Apprendi*, Justice Wells authored a concurring opinion that was joined by Justices Cantero and Bell, in which Justice Wells urged legislative action in light of *Ring* and *Apprendi*. *Steele*, 921 So. 2d at 551 ("I do believe these Supreme Court decisions have brought about a need for the Legislature to undertake an assessment and revision of Florida's statute."). Justice Pariente, in her dissenting opinion in *Steele* with which

that the U.S. Supreme Court's first application of *Apprendi* to capital aggravators happened to involve a state statute that required a finding of at least one aggravator is nothing more than a coincidence that in no way alters *Apprendi's* application to other state schemes. *Steele* cannot stand for the proposition that under Florida's scheme death eligibility arises merely from the existence of one aggravating circumstance given the contrary statutory command and standard jury instructions.[12] Florida law is clear—before a death sentence may be imposed there must be a factual determination that sufficient aggravating circumstances exist to justify a death sentence.

In *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010), the Florida Supreme Court revisited its consideration of *Ring v. Arizona* five years after *Steele* and again cited to the language in *Ring* without reference to the fact that Florida statutes identified factual determinations necessary for death eligibility that were different from the factual determination required for death eligibility under Arizona law. Once again, the Florida Supreme Court did not address the statutory language set forth in the Florida statutes, nor the language appearing in the standard jury instructions. While seeming to adopt the *Ring* description of Arizona law as mandated by the Sixth Amendment and thus the law in Florida, the Florida Supreme Court struck a discordant note when it relied on *Bottoson v. Moore* to maintain that Florida's statutory scheme was constitutional. *Ault*, 53 So. 3d at 206 ("Further, we note that we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*. *See, e.g.*, *Jones*, 845 So. 2d at 74 (rejecting claim that Florida's death penalty is unconstitutional under *Ring*); *see also Bottoson v.*

Justice Anstead concurred, echoed the call for legislative action in the wake of *Ring* and *Apprendi*. *Id.* at 553.

[12] The fact that the Florida Supreme Court has recognized that some aggravating circumstances carry more weight than others clearly demonstrates that the aggravators are not fungible. They are not of equal weight. It logically follows that the sufficiency of the aggravators in any given case is a question of fact on which death eligibility depends.

Moore, 833 So. 2d 693 (Fla. 2002) (noting that the United States Supreme Court did not direct the Florida Supreme Court to reconsider the defendant's death sentence in light of *Ring*); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).").

The State also relies upon Z*ommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010). In *Zommer*, the Florida Supreme Court rejected an argument that *Ring* and *Apprendi* required the sufficiency finding to be made unanimously, that the sufficiency finding must be charged in the indictment, and that sufficiency meant that at least two aggravators must be found "since the statute contains the plural word 'circumstances'":

> Zommer contends that this Court is violating the constitutional doctrine of separation of powers by holding that only one aggravating circumstance is "sufficient" to justify imposition of the death penalty since the statute contains the plural word "circumstances." However, in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), this Court interpreted the term "sufficient aggravating circumstances" in Florida's capital sentencing scheme to mean one or more such circumstances. *See id*. at 9 ("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 . . . mitigating circumstances . . . .").
>
> This Court has explained that "[t]he Legislature is presumed to know the judicial constructions of a law when amending that law, and *the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed*." *Fla. Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) (emphasis supplied). Since the Legislature in the last thirty-six years has not amended the Florida Statutes to provide that at least two aggravating circumstances must be found to impose a sentence of death, it can be presumed that the Legislature agrees with and has adopted this Court's interpretation of the term "sufficient aggravating circumstances" that was articulated in *Dixon*. Accordingly, Zommer's separation of powers challenge lacks merit.

Zommer v. State, 31 So. 3d at 753-54.

The assertion in *Zommer* that in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court had "interpreted the term 'sufficient aggravating circumstances' in Florida's" statute to mean that once an aggravating circumstance is found, "death is presumed to be the proper sentence" is contrary to 40 years of jurisprudence. The only time that undersigned counsel is aware of when a Florida capital jury was instructed that a presumption of death arose from the finding of one or more aggravating circumstances was in *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir. 1988) (Jackson's jury was instructed that "[w]hen 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 provided."). In *Jackson*, the Eleventh Circuit wrote: "Jackson contends that such an instruction amounts to a constitutional error. We agree." *Id*.

In setting forth its reasoning, the Eleventh Circuit referenced a dissent by Justice McDonald of the Florida Supreme Court in *Randolph v. State*:

> Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:
>
> > I would also like to comment on the reference in the majority opinion to *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L. Ed. 2d 295] (1974). I do not embrace the language from that opinion recited in this majority opinion as "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." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an

> aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. **I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor**.
>
> *Randolph v. State*, No. 54–869 (Fla. Nov. 10, 1983) (LEXIS, States library, Fla. file) (McDonald, J., dissenting), *withdrawn*, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S. Ct. 3533, 87 L. Ed. 2d 656 (1985).

Id. (emphasis added). The Eleventh Circuit in *Jackson v. Dugger* then held that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment," that "[w]hen such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified," and that "[a]n instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state." *Id*. at 1473-74. Yet, the conclusion set forth in *Jackson v. Dugger* that the *Dixon* statement of a presumption of death was unconstitutional if employed by either a Florida jury or a Florida judge was not mentioned by the Florida Supreme Court in *Zommer*, while maintaining that the *Dixon* presumption had been the law in Florida for all 37 years that passed between *Dixon* and *Zommer*.

The Florida Supreme Court clarified this point in *Randolph v. State*, stating that *Dixon* stands for the proposition only that "[o]ne valid aggravating circumstance **may be sufficient** to support a death sentence in the absence of at least one overriding mitigating circumstance." 463 So. 2d 186, 193 (Fla. 1984) (emphasis added) (citing *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)).

Randolph clarifies that the purpose of this language in *Dixon* was "to stress that the capital sentencing procedure is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather 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." *Id*. (formatting of block quotation omitted). *Dixon* does not change what critical, operable finding of fact the legislature has determined must be made to render a capital defendant death eligible, which in turn must be found by a jury under the Sixth Amendment principles of *Apprendi*, *Ring*, and *Hurst*.

Apprendi, *Ring*, and *Hurst* hold that the fact or facts necessary to render a capital defendant death eligible must be made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602. Florida's statute requires a finding that sufficient aggravating circumstances exist to justify a sentence of death. This statutorily defined fact that is necessary for death eligibility is repeated to the jury in Florida's standard jury instructions as the issue to be resolved in the jury's penalty phase deliberations before returning an advisory verdict my a majority vote. The cases on which the State relies—*Steele*, *Ault*, and *Zommer*—simply ignore the factual requirement set forth in Florida's statute and in Florida's standard jury instructions.

The fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death eligible is unlike the Arizona law which was at issue in *Ring*, and has at least two important consequences in assessing *Hurst's* scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error, and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed there must

be a finding that those circumstances if present are sufficient in a given case to justify a death sentence. Not all prior violent felonies are equal. The sufficiency finding required by the statute means that there must be a case specific assessment of the facts of the prior crime of violence and a determination as to whether the facts of the prior crime of violence in conjunction with the factual basis for any other aggravating circumstance present in the case are sufficient to justify the imposition of death sentence.

b. Unanimous findings as to the elements of capital murder identified in *Hurst*

Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Id*. at 714. The Florida Legislature adopted the English common law rule on November 6, 1829 with enactment of Section 775.01 of the Florida Statutes. *See id*. Florida's first Constitutional Convention adopted the right to a jury trial when it proclaimed in Article I of our Declaration of Rights that "the right of trial by jury, shall for ever remain inviolate." Fla. Const. art. I, § 6.

The Florida Supreme Court recognized over a century-and-a-half ago that "[t]he common law wisely requires the verdict of a petit jury to be unanimous." *Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859). And the Florida Supreme Court has held true to that requirement over the years, stating in *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881) that "[t]he record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact," and later in *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) that "[i]n this state, the verdict of the jury must be unanimous."

The Florida Supreme Court has memorialized the requirement in Florida Rule of Criminal Procedure 3.440. It provides that "[n]o verdict may be rendered unless all of the trial jurors concur in it," that a court may not even correct matters of form in a verdict without "the unanimous consent of the jurors," and that a verdict cannot be entered of record if "disagreement is expressed by one or more" jurors. Fla. R. Crim. P. 3.440 (Rendition of Verdict; Reception and Recording). The requirement also appears in Florida Court's Standard Jury Instruction 3.10, which admonishes juries that "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict."

Thus,

> [i]t is settled in Florida that the State in a criminal prosecution has the burden of proving each element of the charged offense beyond a reasonable doubt. Before jurors can return a guilty verdict, they must unanimously agree that each element of the charged offense has been established beyond a reasonable doubt.

Bottoson, 833 So. 2d at 714 (Shaw, J., concurring) (footnotes omitted). This has been Florida law since 1829.

At issue in *Apprendi* was a sentencing statute in which the New Jersey Legislature "decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense," so that it would be found by a judge, rather than a jury. *Apprendi*, 530 U.S. at 471. This violated the Sixth Amendment and the right to a jury trial embodied therein, as the United States Supreme Court explained in *Apprendi*:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter

> Blackstone) (emphasis added). *See also Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Apprendi, 530 U.S. at 477 (alterations and emphasis in original). The foundation of *Apprendi* was built firmly on the inviolable right to the unanimous suffrage of twelve jurors.

Observing that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding," *id*. at 478 (footnote omitted), the *Apprendi* Court ruled that any finding of fact which "expose[s a defendant] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," **is an element**, and thus must be found by a jury. *Ring*, 536 U.S. at 586 (citing *Apprendi*). The Court stated that "[d]espite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

Because in Florida "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment," *Hurst*, No. 14-7505, 2016 WL 112683 at *3 (citing Florida Statutes § 775.082(1)), and a finding must be made that sufficient aggravating circumstances exist before a Florida capital defendant can be sentenced to death, *see id*., that critical finding, under *Apprendi*, is an element of the offense of capital murder. This is the logical result of the ruling in *Hurst* applying *Apprendi* to Florida's death penalty scheme and finding it unconstitutional. The factual determination that sufficient aggravating circumstances exist to justify the imposition of a death sentence is an element of the offense of capital first degree murder: the crime of first degree murder plus the element rendering the defendant eligible for a sentence of death. Pursuant to longstanding Florida law, all of the elements of capital first degree

murder, including the determination that sufficient aggravating circumstances exist, must be found unanimously by a jury.

Following the issuance of *Ring v. Arizona*, the Florida Supreme Court was called upon to address *Ring* and its applicability to Florida in *Bottoson v. Moore*. While a narrow per curiam opinion issued that relied upon the failure of the opinion in *Ring* to expressly overrule *Hildwin v. Florida* and *Spaziano v. Florida,* five members of the Florida Supreme Court wrote separately.[13] In these separate opinions, the issue of how aggravators, if treated as elements under *Ring*, would be subject to the unanimity requirement was addressed. Now that *Hurst* has confirmed that a finding that the sufficient aggravators to justify a death sentence are present is required, indeed an *Apprendi* element, the discussions take on new significance.[14] Justice Anstead wrote:

> As noted above, *Apprendi* and *Ring* also stand for the proposition that under the Sixth Amendment, a determination of the existence of aggravating sentencing factors, just like elements of a crime, must be found by a unanimous jury vote. As the Supreme Court expressly noted in *Ring*, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, 536 U.S. at —, 122 S. Ct. at 2443.
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> . . . Furthermore, in *Jones v. State*, 92 So. 2d 261 (Fla. 1956), this Court held that any interference with the right to a unanimous

[13] Only three members of the Florida Supreme Court concurred in the *Bottoson* per curiam opinion. Four members of the Court "concur[red] in result only with opinions." *Bottoson v. Moore*, 833 So. 2d at 695.

[14] Now after *Hurst*, the words of Justice Lewis in his concurrence read like the predictions of the Greek Cassandra whose prophecies unwisely went unheeded. *Bottoson v. Moore*, 833 So. 2d at 725 ("Blind adherence to prior authority, which is inconsistent with *Ring,* does not, in my view, adequately respond to, or resolve the challenges presented by, the new constitutional framework announced in *Ring.* For example, we should acknowledge that although decisions such as *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984), have not been expressly overruled, at least that portion of *Spaziano* which would allow trial judges to override jury recommendations of life imprisonment in the face of Sixth Amendment challenges must certainly now be of questionable continuing vitality.").

> verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.

Bottoson, 833 So. 2d at 709-10 (Anstead, J., concurring in result only).

Justice Shaw agreed:

> In my opinion, when the dictates of *Ring v. Arizona* are imposed on Florida's capital sentencing statute, the statute violates settled principles of state law. The rule of law that I glean from *Ring* is that an aggravating circumstance that "death qualifies" a defendant is the functional equivalent of an element of the offense. If this is a correct reading of *Ring*, then that aggravator must be treated like any other element of the charged offense and, under longstanding Florida law, must be found unanimously by a jury. Florida's capital sentencing statute, however, currently contains no unanimity requirement . . . .

Id. at 711 (Shaw, J., concurring) (citations and footnote omitted).

Justice Pariente also appreciated the unanimity problem raised by *Apprendi* and *Ring*: "I share the concerns expressed by Justice Shaw . . . that *Ring* may render our sentencing statute invalid under state constitutional law to the extent that there is no requirement that the jury find the existence of aggravators by unanimous verdict." *Id*. at 722 (Pariente, J., concurring).

Now that *Hurst* has held that *Bottoson* erred in failing to find Florida's capital sentencing scheme unconstitutional under *Apprendi* and *Ring*, the factual determinations set forth as prerequisites for the imposition of a death sentence in § 921.141(3) are now in fact *Apprendi* elements. As a result, *Hurst* has vindicated the concerns expressed in the *Bottoson* concurrences, and the Sixth Amendment infirmity in Florida's death penalty scheme arising from a lack of a unanimous jury verdict is no longer a hypothetical proposition. It is a reality.

The justices that disagreed with concerns over unanimity did so because they felt bound

by the still-precedential U.S. Supreme Court decision in *Hildwin*:

> Given the operation of Florida's statutory scheme, aggravating factors should not be considered elements, nor, I conclude, are they the functional equivalent of elements of a greater offense such that *Ring* would require that they be found unanimously by a jury. *See Hildwin*, 490 U.S. at 640–41, 109 S. Ct. 2055 (stating that the existence of an aggravating factor does not constitute an element of the offense under Florida's criminal statute, but is a sentencing factor triggered upon a finding of guilt).

Bottoson, 833 So. 2d at (Lewis, J., concurring). *Hurst* specifically concluded that the logic of *Hildwin* did not survive *Apprendi* and *Ring*, and can no longer serve as a basis for refusing to recognize the fact that death eligibility in Florida must be found by a unanimous jury.

Beyond the statements of these justices, existing Florida law mandates that the § 921.141(3) findings be found unanimously as elements. For non-capital crimes—crimes hugely less egregious than capital murder—the State of Florida already treats sentencing factors that increase a defendant's exposure to a greater penalty as elements that must be found unanimously:

> Significantly, Florida law currently requires a number of sentence enhancing "elements" or "aggravating circumstances" for other noncapital offenses to be submitted to the jury, found beyond a reasonable doubt by a unanimous jury, and reflected in the jury's verdict. These are the type of sentence enhancing elements that increase a defendant's sentence for a term of years. For example, Florida's burglary statute increases the punishment imposed on a defendant if certain aggravating circumstances are present. See § 810.02, Fla. Stat. (2001). If the jury finds that the state has proved a particular aggravating circumstance beyond a reasonable doubt, they are required to find the defendant guilty of the enhanced crime, such as "burglary with an assault," "burglary while armed," "burglary of a dwelling," or "burglary of a structure with a human being in the structure." *See* Fla. Std. Jury Instr. (Crim.) 13:1. When no aggravating circumstances are found, the jury should find the defendant guilty only of burglary. *See id*. Thus, it is possible to tell from the jury's verdict which aggravators were factually found, because the verdict will reflect the aggravating circumstances through the crime that jury finds established. We have extended this reasoning to other crimes involving drugs, guns, etc. Thus, in Florida, we have long held that defendants charged with lesser crimes should receive the benefit of the increased Sixth

Amendment protection as provided in *Apprendi*.

Bottoson, 833 So. 2d at 709 n.21 (Anstead, J., concurring). *Hurst's* treatment of Florida's death-qualifying factfindings as elements "imposes upon that aggravator the same rigors of proof as other elements, including Florida's requirement of a unanimous jury finding." *Id*. at 717 (Shaw, J., concurring).

c. Separation of powers principles prevent any remedial statutory construction in an attempt to cure *Hurst* error, which is structural in nature.

To be clear, there is no constitutionally valid death penalty statute currently in effect in Florida. This means that Florida does not have a constitutionally valid capital sentencing scheme. Not knowing what Florida's *Hurst*-appropriate death penalty will be makes it extremely difficult for anyone to presently catalogue and/or articulate the impact of the constitutional error identified in *Hurst*. In fact, the Florida Supreme Court lacks the institutional authority to, in essence, develop a death penalty statute through interpretation, because such action would circumvent the legislative branch's lawmaking authority. *See* Fla. const. art. II, § 3; Fla. const. art. V, § 2a.

After declaring Florida's capital sentencing scheme unconstitutional, the *Hurst* decision reversed the judgment of the Florida Supreme Court and remanded for further proceedings not inconsistent with the *Hurst* opinion. The U.S. Supreme Court specifically, and as a matter of course, left it for the Florida Supreme Court to consider on remand "the State's assertion that any error was harmless. *Hurst*, 2016 WL 112683, at *8 (citing *Neder v. United States*, 527 U.S. 1, 18–19 (1999) for holding that "the failure to submit an uncontested element of an offense to a jury may be harmless"). The U.S. Supreme Court stated, "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." *Id*. What is important to note about this language in *Hurst* is that nothing was resolved.

The State's argument that "any error was harmless" was left to be addressed by the Florida Supreme Court, consistent with the U.S. Supreme Court's usual practice. The citation to *Neder* merely noted that therein the U.S. Supreme Court had concluded that the failure to submit an uncontested element of an offense to a jury *may be* harmless. But because the U.S Supreme Court expressed no opinion on the State's argument in *Hurst*, there was no resolution of whether the error identified in *Hurst* can properly be described as simply a "failure to submit an uncontested element of an offense to a jury." Indeed, as explained herein, the determination in *Hurst* that Florida's capital sentencing scheme is unconstitutional does not equate to a simple failure to submit an uncontested element to a jury. The unconstitutional sentencing scheme in Florida: 1) erroneously left it for the judge to determine whether sufficient aggravating circumstances existed to justify a death sentence; 2) erroneously informed the jury and defense counsel that the jury's penalty phase verdict was merely advisory; 3) erroneously informed the jury and defense counsel that the jury could render its advisory sentencing recommendation by a majority vote; and 4) failed to notify defense counsel that a single juror with reasonable doubt as to whether sufficient aggravating circumstances existed to justify a death sentence could preclude the imposition of a sentence. Thus, the error arising from Florida's employment of its unconstitutional sentencing scheme involved much, much more than a simple failure to submit an uncontested element to a penalty phase jury. Indeed, using the unconstitutional capital sentencing scheme at issue in *Hurst* to impose a death sentence constitutes structural error that can never be harmless.

Hurst found Florida's capital sentencing scheme unconstitutional. It is the first case to do so since *Furman v. Georgia*. Conceptually then, evaluating the impact of the constitutional error under *Hurst* on any one particular death sentence is most akin to evaluating the impact of the

Furman constitutional error on any one particular death sentence. After *Furman*, no one was successful in asserting that *Furman* error was or could be harmless. This suggests that constitutional defects identified in *Furman* were structural in nature. *Furman* was not just about error within a capital penalty phase. It was not just concerned with the improper admission of evidence, the improper exclusion of evidence, or erroneous or misleading jury instructions. Thus, *Furman* was not simply "trial error which occur[s] during the presentation of the case to the jury;" *Furman* identified "structural defects in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 291, 308-09 (1991). *Furman* was a determination that the manner in which Florida's capital sentencing scheme functioned as a whole was unconstitutional. As a result, it was also beyond the power of the judicial branch to provide a fix.

Because *Hurst* declared Florida's capital sentencing scheme unconstitutional, it too extends beyond "trial error which occur[s] during the presentation of the case to the jury." While certainly one can identify specific trial errors that infect any one defendant's penalty phase in light of *Hurst*, the specific trial errors identified were a product of the "structural defects in the constitution of the trial mechanism." For example, Mr. Lambrix's penalty phase jury was repeatedly told throughout the trial (in voir dire, in counsel's arguments, and in the court's instructions), that its verdict was advisory, merely a sentencing recommendation. Under *Hurst*, the jury's determination of death eligibility cannot just be advisory, but must be binding under the Sixth Amendment. This means that the jury verdict that was returned in Mr. Lambrix's case cannot now be converted into some sort binding determination that sufficient aggravating circumstances existed to justify death because to do so would create error under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), i.e. the jury would have been provided misinformation regarding the binding nature of its verdict which diminished its sense of responsibility for the

outcome.

Another example, Mr. Lambrix's penalty phase jury was told that its penalty phase verdict did not need to be unanimous. However, under *Hurst*, the fact necessary to render a defendant death eligible is an element of the criminal offense. Under Florida law, jury unanimity is required as to all elements of a criminal offense. While it should be obvious that a non-unanimous verdict cannot in retrospect become a unanimous verdict, the error is but a manifestation of the "structural defects in the constitution of the trial mechanism."

But looking only to the record of the penalty phase proceeding fails to capture how counsel's trial preparation and penalty phase strategies were impacted by the capital sentencing scheme then in place, which has now been identified as unconstitutional. Imagine how differently counsel might approach a guilt phase in which the jury is instructed that its verdict would be an advisory recommendation that was to be rendered by majority vote. Trial counsel would undoubtedly make different choices in how he or she investigated the case and in the type of defense that was presented. It would seem less likely that defense counsel would employ the defense now commonly used that focuses on making the State prove the elements beyond a reasonable doubt to all trial jurors. Voir dire would be conducted differently. Counsel would less likely look for jurors who counsel believes would have the strength to be a holdout, jurors who would stand up to peer pressure and be capable of being a persuasive voice during deliberations. Peremptory challenges would be exercised differently. As to the presentation of evidence before a jury who would decide guilt by a majority vote, counsel would likely have to focus more on presenting evidence for the defense and less on attacking the State's case in order to raise reasonable doubt. This would likely result in a shift in how investigative resources are deployed,

what cross-examination is conducted, and what evidence is presented by the defense.[15]

However, the biggest difference in the conduct of the proceeding would occur behind a closed door during the jury's deliberations. Requiring juries to return unanimously a verdict they know is binding means jurors will actually deliberate, discuss, ponder, analyze, and think about what is the right verdict to return. It encapsulates the bedrock of the American criminal justice system: that the best and most reliable decisions are made through the crucible of an adversarial testing. For the process to reliably function, the decision maker must know the importance of her decision so that she can actually deliberate as to the proper result. An advisory verdict by a majority vote is actually nothing more than a straw poll. When jurors know that their verdict is advisory in nature and unanimity is not required, of course the deliberative functioning evaporates.

But an analysis of the full impact of *Hurst* cannot be conducted in any meaningful way until a constitutional sentencing scheme is in place.[16] At this point, no one knows what the new

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[15] Mr. Lambrix does seek an opportunity to call witnesses to testify regarding the impact of the *Hurst* decision on the defense counsel and the strategic choices he would make in preparing for trial and the strategic choices he would make at trial.

[16] The circumstances post-*Hurst* are unlike those presented in the wake of *Hall v. Florida*, 134 S. Ct. 1986 (2014), where the United States Supreme Court indicated that the Florida Supreme Court could have construed the statute at issue in a constitutional fashion. As a result, the fix was a matter that could be addressed by the Florida Supreme Court by simply construing the statute in a constitutional fashion. Similarly, the remedy for a statutory violation of the Eighth Amendment under *Lockett v. Ohio*, 438 U.S. 586 (1978), was to construe the statute in a constitutional fashion as permitting the presentation of non-statutory mitigation. The constitutional violations identified in both *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992), concerned jury instructions that were inadequate under the Eighth Amendment, classic trial error. But of course, the *Hitchcock* error was also often accompanied by *Lockett* error and for that reason the Florida Supreme Court ultimately recognized the *Lockett*/*Hitchcock* error also had a constraining effect of trial counsel's understanding of whether nonstatutory mitigation was even admissible. For that reason, the Florida Supreme Court ultimately concluded that *Hitchcock* error often required the presentation of evidence regarding the impact of the error on trial counsel's failure to present nonstatutory mitigation. *See Hall v. State* and *Meeks v. Dugger*. Thus, *Hurst* is qualitatively different than the

sentencing scheme will look like. Until the legislative fix (assuming there is one) is known, the full impact of the shift from an unconstitutional sentencing scheme to a new (and hopefully) constitutional sentencing scheme cannot be determined.

Since the Framing of the Federal Constitution, the federal system of government is thought to be best secured by dividing governmental powers. *See United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000). Unlike the Federal Constitution's implicit separation of powers doctrine, Florida has an explicit Separation of Powers Clause in its Constitution. *See* Fla. const. art. II, § 3 ("The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [within Florida's constitution]"). Thus, Florida employs a "strict" application of the separation of powers doctrine, demanding two fundamental prohibitions. *See Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (quoting *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000)). "The first is that no branch may encroach upon another's power." *Id.* "The second is that no branch may delegate to another branch its constitutionally assigned power." *Id.* (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)). The doctrine of separation of powers is designed to keep each of the branches free from the *direct or indirect coercive influence* of the others. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935). Thus, just as a statute purporting to modify or create a procedural rule is constitutionally invalid, a judicial attempt at modifying, creating, or otherwise rewriting a substantive statutory right is constitutionally invalid. *See* Fla. Const. Art. II, § 3; Fla. const. art. V, § 2a. A law is substantive if it "creates, defines, and regulates rights, or that part of

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constitutional errors found in *Hall v. Florida*, *Lockett v. Ohio*, *Hitchcock v. Dugger*, and *Espinosa v. Florida*. The remedy for the finding in *Hurst* that Florida's capital sentencing scheme is unconstitutional is both unknown and beyond the reach of the judicial branch. Legislative action is required.

the law which courts are established to administer." *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). "It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property." *Id*. "[W]here a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional." *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

We know from *State v. Steele* that the justices of the Florida Supreme Court believe that it is for the legislature to address and/or remedy any issues arising under the Sixth Amendment principles set forth in *Apprendi* and *Ring*. Even though a majority of the Florida Supreme Court asserted Florida's capital sentencing was constitutional and not in violation of *Ring* or *Apprendi*, Justice Wells authored a concurring opinion that was joined by Justices Cantero and Bell, in which Justice Wells urged legislative action in light of *Ring* and *Apprendi*. *Steele*, 921 So. 2d at 551 ("I do believe these Supreme Court decisions have brought about a need for the Legislature to undertake an assessment and revision of Florida's statute."). Justice Pariente in her dissenting opinion in *Steele* in which she was joined by Justice Anstead joined in the call for legislative action in the wake of *Ring* and *Apprendi*. *Id.* at 553.

Now that the United States Supreme Court has concluded that the Florida Supreme Court erred in failing to recognize Florida's capital sentencing scheme was unconstitutional, the call made by five Justices in *Steele* for legislative action is no longer merely wise; it is mandatory if Florida is to retain capital punishment. As the decision in *Hurst* has made the determination that sufficient aggravating circumstances exist a substantive element of capital murder, there can be no doubt that defining the substantive element of capital first degree murder is a matter of

substantive law.[17] Any temptation by the Florida courts to define the elements of capital first degree murder usurps legislative power and violates the constitutionally mandated separation of powers doctrine.

The alternative to new legislative action is reliance on old legislative action. Section 775.082(2) was adopted in anticipation of the decision *Furman v. Georgia* to make a remedy available on the day that Florida's capital sentencing scheme was found unconstitutional. Section 775.082(2) provides: "In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)." *See Donaldson v. Sack*, 265 So. 2d 499, 505 (Fla. 1972) ("We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already

[17] Indeed, the risk of a separation of powers violation is further illuminated by comparing the implications of the decision in *Hurst* to those under *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Hall*, the U.S. Supreme Court stated that this Court could have interpreted Florida's statute defining intellectual disability to make it constitutional. *Id*. at 994 ("On its face, this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case . . . But the Florida Supreme Court has interpreted the [intellectual disability] provisions more narrowly."). Accordingly, an ameliorative construction of the statute was identified within the *Hall* opinion. While as a result of *Hurst*, the legislatively created statutory scheme itself is fundamentally and structurally unconstitutional, because it requires the judge to find the element of capital first degree murder that renders a defendant death eligible. And certainly had defense counsel known that the sufficiency of the aggravating circumstances was an element of the crime of capital first degree requiring a jury to determine its existence beyond a reasonable doubt, the presence of the element would have been contested. The error is not simply the failure to submit an uncontested element to the jury. The only cure for the use of an unconstitutional sentencing scheme is a legislative revision of the statute.

convicted without recommendation of mercy and under sentence of death."). Section 775.082(2), which applied when *Furman v. Georgia* issued, appears on its face to apply now given the determination in *Hurst* invalidating Florida's capital sentencing scheme.

As previously set forth, the Florida Supreme Court in *State v. Steele*, 921 So. 2d at 548, recognized the "The Need for Legislative Action," in dealing with Florida's *Apprendi* problem, stating "we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations." Despite the Florida Supreme Court's request for legislative action, none was forthcoming. This means that the problem is a legislative problem, now that *Hurst* has issued and overturned *Bottoson v. Moore*, *Mills v. Moore*, *Hildwin v. Florida*, and *Spaziano v. Florida*. The potential *Apprendi* problem discussed in *Steele* has now led to *Hurst* and the U.S. Supreme Court's declaration that Florida's capital sentencing scheme is unconstitutional. At the moment, § 775.082(2) is the only legislative fix on the table.

II. *Hurst* is retroactive under Florida law.

The Florida Supreme Court has stated that "[c]onsiderations of fairness and uniformity make it very **difficult to justify depriving a person of** his liberty or **his life**, **under process no longer considered acceptable and no longer applied to indistinguishable cases**." *Witt*, 387 So. 2d at 925 (emphasis added) (quotations omitted). *Hurst* rejects as constitutionally infirm the process under which Florida defendants are sentenced to death. There is no question but that indistinguishable cases will receive the benefit of *Hurst* simply because those cases are pending

on direct appeal or are pending for a retrial or a resentencing.[18] According to the Florida Supreme Court's law, it must be very difficult to justify depriving Mr. Lambrix of the benefit of *Hurst's* determination that the capital sentencing scheme under which he received a sentence of death is unconstitutional.

The essential principle of Florida's retroactivity law is that only the very important cases apply retroactively. Only a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify. *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citing *Witt v. State*, 387 So. 2d 922, 925, 929, 931 (Fla. 1980)). *Hurst*,

[18] There is no dispute that every death sentenced individual whose case is still pending in circuit court or is on direct appeal in the Florida Supreme Court will receive the benefit of the *Hurst* decision. Whether relief is granted to those individuals or not, they will receive the benefit of the decision simply because of when *Hurst* issued. But those receiving the benefit of *Hurst* also include capital defendants who received death sentences long ago, but who have received collateral relief and are awaiting a new trial or a resentencing.

For example, Rickey Roberts who was convicted of a crime committed in 1984. His death sentence was affirmed in *Roberts v. State*, 510 So. 2d 885 (Fla. 1987). His death sentence was vacated in collateral proceedings in *Roberts v. State*, 840 So. 2d 962 (Fla. 2002). He is still in a Miami-Dade County jail awaiting his resentencing. Indeed, the presiding judge in anticipation of *Hurst* stayed the resentencing. Mr. Roberts convicted of a 1984 homicide will receive the benefit of the decision in *Hurst.* Similarly, Paul Hildwin was convicted of a crime committed in 1985. His death sentence was affirmed by the Florida Supreme Court in *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988), and by the United States Supreme Court in *Hildwin v. Florida*, 490 U.S. 638 (1989). Mr. Hildwin conviction and sentence of death were vacated in collateral proceedings in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Mr. Hildwin is awaiting his new trial. Mr. Hildwin who was convicted of a 1985 homicide will receive the benefit of *Hurst* if he is convicted again.

Another example of someone who will receive the benefit of *Hurst* is Paul Beasley Johnson who was convicted of a crime committed in 1981. His death sentence was affirmed in *Johnson v. State*, 438 So. 2d 774 (Fla. 1983). Mr. Johnson first received collateral relief in *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986), when a new trial was ordered. Subsequently, Mr. Johnson was again convicted and sentenced to death. His death sentence was again affirmed in *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). Mr. Johnson's death sentence was later vacated in collateral proceedings. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). At a resentencing, Mr. Johnson was again sentenced to death. Currently, Mr. Johnson's sentence of death is pending on direct appeal in the Florida Supreme Court. *Johnson v. State*, Case No. SC14-1175. Oral argument in the direct appeal is scheduled for March 8, 2016. Unquestionably, Mr. Johnson will receive the benefit of *Hurst*.

perhaps more so than virtually any other case, satisfies this standard.

Before *Hurst*, *Furman v. Georgia*, 408 U.S. 238 (1972) was the paradigmatic example.[19] In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. *Furman* was a difficult decision for the Supreme Court, which "had not been so visibly fragmented since its earliest days," agreeing only on a "terse per curiam statement announcing the result reached," and issuing nine separate opinions, four in dissent. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1758 (1987). On the basis of *Furman*, the Florida Supreme Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972).[20] Interestingly, there was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with undeniably unconstitutional executions.

As noted *supra*, the Florida Legislature in anticipation of the holding in *Furman* enacted Florida Statutes § 775.082(2), which provides:

> In the event the death penalty in a capital felony is held to be

[19] When *Hurst's* predecessor *Ring* issued and it appeared that *Ring's* holding would do essentially what *Hurst's* has now done, Justice Anstead of the Florida Supreme Court commented that "*Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*," that "we cannot simply stand mute in the face of such a momentous decision," and that "[t]he question is where do we go from here." *Bottoson v. Moore*, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, J., concurring).

[20] In *Anderson*, the Florida Supreme Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the death sentence imposed in these cases is illegal.").

> unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

The Florida Supreme Court read this statute to leave absolutely no discretion for Florida courts when, as in *Hurst*, the death penalty was found unconstitutional. The Florida Supreme Court found that the statute requires "an automatic sentence and a reduction from the sentence previously imposed," because "[t]he Court has no discretion." *Anderson v. State*, 267 So. 2d 8, 9 (Fla. 1972). The Court found simply that "[u]nder the circumstances of these particular cases, it is our opinion that we should correct the illegal sentences previously imposed without returning the prisoners to the trial court," and vacated the sentences. *Id*. at 10. Everyone who had received a sentence of death under the capital sentencing scheme declared unconstitutional in *Furman* received the benefit of the decision.

Based on *Anderson*, the imposition of life sentences on defendants sentenced under the death penalty scheme found unconstitutional in *Hurst* was, pursuant to § 775.082(2) and *Anderson*, a ministerial, administrative matter. There was no inquiry into retroactivity. There was no argument that harmless error analysis was available when a capital sentencing scheme was declared unconstitutional.[21] There was no discretion to exercise; life sentences were mandated

[21] When *Furman* issued, it was not like the concept of harmless error was an unfamiliar concept. The United States Supreme Court had explained five years before when constitutional error could be found to be harmless. *Chapman v. California*, 386 U.S. 18, 21-22 (1967) ("We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule."). Yet, no argument was ever advanced that *Furman* error was harmless.

for everyone sentenced to death under an unconstitutional sentencing scheme.[22]

However, if § 775.082(2) is not applied here when the capital sentencing scheme has been held to be unconstitutional and a retroactivity analysis is deemed necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst*, unlike *Furman*, states unequivocally that "[w]e hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 at *3 (U.S. Jan. 12, 2016).[23] *Hurst*, unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman*, did not fragment the United States Supreme Court at all. On the contrary, *Hurst* was an eight-to-one, resoundingly unified pronouncement from the Supreme Court that Florida's sentencing of capital defendants has long been unconstitutional. In Florida, *Hurst* is just as much a sweeping jurisprudential upheaval of fundamental significance as was *Furman*.[24] In Florida, *Hurst*, just as *Furman* was, must be retroactively applied.

a. Cases previously found retroactive in Florida under *Witt*

Besides *Furman*, there are a number of instances of retroactive application of major precedents by the Florida Supreme Court which are instructive here.

In 1980, the Florida Supreme Court formulated a standard for determining retroactivity in

[22] The legislature in response to the June 29, 1972, decision in *Furman* enacted a new capital sentencing scheme on December 8, 1972. *State v. Dixon*, 283 So. 2d at 2.

[23] Again *Furman* was a case directly involving the Georgia and Texas capital sentencing schemes. The Florida capital sentencing scheme wasn't directly in front of the *Furman* Court. However, the Florida Supreme Court determined with the concurrence of the Florida Attorney General that the Florida capital sentencing scheme was unconstitutional under the reasoning of *Furman.*

[24] The only way that the *Hurst* impact is less significant is its effect outside the State of Florida. Virtually every other state's capital sentencing scheme at risk in the wake of *Ring v. Arizona* was changed by legislative action. Therefore, the impact of *Hurst* is focused within Florida. But within Florida, *Hurst* is as significant as *Furman*. And the reason for that is the Florida legislature's refusal to act despite repeated calls for action from the Florida Supreme Court.

its decision in *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). There, the Court explained:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as **ensuring fairness and uniformity in individual adjudications.** Thus, society recognizes that **a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice**.

The Florida Supreme Court acknowledged that the appellant in *Witt* was under a sentenced of death:

> Uniquely, capital punishment, on the one hand, connotes **special concern for individual fairness** because of the possible imposition of a penalty as unredeeming as death. On the other hand, both the frequency of Florida "law changes" involving our relatively **new capital punishment statute**, and the unavoidable delay in deciding these cases, suggest that finality will be illusory if each convicted defendant is allowed the right to relitigate his first trial upon a subsequent change of law.

Id. at 926 (emphasis added) (footnotes omitted).[25]

The Florida Supreme Court acknowledged that Florida's postconviction procedures were developed in response to the decision in *Gideon v. Wainwright*, 373 U.S. 335 (1963):

> [W]e cannot ignore the purpose for our post-conviction relief procedure in cases where a death penalty has been imposed, for Florida's post-conviction relief rule came about as a narrow response to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). That decision, it will be recalled, first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding. The Gideon decision constituted a change of law of **such magnitude** that it was applied retroactively in order to remedy the basic constitutional injustice of prior felony trials without counsel.

[25] It must be observed that *Witt* was decided in 1980, seven years after the new death penalty scheme went into effect. The concern expressed in *Witt* regarding the frequent adjustments to the "new capital punishment statute" simply pales in comparison to the 8-1 decision in *Hurst* declaring Florida's entire capital sentencing scheme unconstitutional.

Witt, 387 So. 2d at 927 (emphasis added).

The Florida Supreme Court then observed that it was not obligated to employ federal retroactivity standards. *Witt v. State*, 387 So. 2d at 928 ("We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where fundamental federal constitutional rights are not involved. First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery.") (footnote omitted). The Court in *Witt* then formulated the analysis to be employed in determining when a change in law would be given retroactive effect by Florida courts: "To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. Most law changes of "fundamental significance" will fall within the two broad categories described earlier." *Witt*, 387 So. 2d 931.[26]

[26] The Florida Supreme Court discussed the *Witt* analysis in *Bunkley v. State*, 833 So. 2d 739, 744 (Fla. 2002) (footnotes omitted), and explained:

> In brief, changes in the decisional law are divided into two subgroups for retroactivity purposes. A "jurisprudential upheaval" is a *major* constitutional change of law, announced by either this Court or the United States Supreme Court, that addresses a basic unfairness in the system. The unfairness must be so fundamental that it undermines confidence in the validity of final cases and outweighs the doctrine of finality. An "evolutionary refinement," on the other hand, is a conventional change that affords new or different guidelines for Florida courts in exercising their authority in applying the law. Jurisprudential upheavals are applied retroactively; evolutionary refinements are not applied retroactively. We add that, as opposed to "changes" in the law, an entirely separate body of precedent, i.e., "clarifications" in the law, has no application under Florida law in the context of retroactivity.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, the Florida Supreme Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court found that the penalty phase jury instructions given in a capital case had violated *Lockett v. Ohio* and that Hitchcock's death sentence stood in violation of the Eighth Amendment.

Shortly after *Hitchcock*, a death sentenced individual with an active death warrant argued to the Florida Supreme Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, the Florida Supreme Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).[27]

[27] The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, the Florida Supreme Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, the Florida Supreme Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). Then on September 9, 1987, the Florida Supreme Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, the Florida Supreme Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." In *Downs*, the Florida Supreme Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, the Florida Supreme Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, the Florida Supreme Court issued its opinion in *Demps*, and thereto

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court held that mitigating factors in a capital case could not be limited to a statutory list. The Florida Supreme Court interpreted *Lockett* to require that a capital defendant merely to have had the opportunity to present any mitigation evidence; it was not found to have required the jury to be instructed that its consideration of the mitigation was limited to the statutory list of mitigators. *See Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. *Hitchcock* held that the Florida Supreme Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the Florida Supreme Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

Following *Hitchcock,* the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia, Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, the Florida Supreme Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071. Clearly, the reasoning of *Hitchcock* demonstrated the Florida Supreme Court had misread *Lockett* in a whole series of cases.[28] And in

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addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

[28] This aspect of *Hitchcock* is parallel to what has occurred in *Hurst*. The Florida Supreme Court, beginning with *Mills v. Moore* in 2000, and *Bottoson v. Moore* in 2002, misread *Apprendi* and *Ring*. Reliance on *Mills* and in particular on *Bottoson* permeated the Florida Supreme Court's

Thompson and *Downs*, the Florida Supreme Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its erroneous reading of *Lockett*, should be entitled to the same relief afforded to Mr. Hitchcock.[29]

Comparing the *Lockett/Hitchcock* scenario to the *Apprendi/Ring/Hurst* scenario is like comparing the first manned space flight to the first manned lunar landing: the flight was a momentous event when it happened, but after men landed on the moon, it paled in comparison. In *Lockett/Hitchcock*, at no time was there a determination that Florida's capital sentencing scheme was unconstitutional. In *Lockett/Hitchcock*, no U.S. Supreme Court decision upholding Florida's capital sentencing scheme was declared overruled by the U.S. Supreme Court, and no legislative fix was required. The Florida Supreme Court's determination that *Hitchcock* warranted retroactive application means that under *Witt* the substantially greater upheaval in Florida law created by *Hurst* certainly must be applied retroactively.

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capital jurisprudence during the entirety of the thirteen and a half years that followed before *Hurst* issued. *See* Appendices A and B. Indeed, the reliance on the *Bottoson* misreading of *Apprendi* and *Ring* has been much greater than the reliance upon the Florida Supreme Court's misreading of *Lockett*. Florida's standard jury instructions were fixed to reflect the holding in *Lockett* by 1980, two years after *Lockett* issued.

[29] *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) presented a scenario in line with *Hitchcock*. *Espinosa* announced that "if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082. In *James v. State*, the Florida Supreme Court applied retroactively a claim based on *Espinosa*. *See* 615 So. 2d 668, 669 (Fla. 1993). There was no express *Witt* analysis conducted by the Florida Supreme Court in *James*; however, James received the benefit *Espinosa* even though his conviction was final years before *Espinosa* issue in 1992. *See id*. Justice Grimes's dissented in *James*, arguing that retroactive application was inappropriate, because *Espinosa* was not among those cases, like *Hitchcock*, that should be deemed constitutional upheavals in the law. *See id*. at 670 (Grimes, J., dissenting) ("I do not view *Espinosa* as a change of law of significant magnitude to require retroactive application. The *Espinosa* error is much different from that pronounced in *Hitchcock*.") (citation omitted). *Hurst* is a much greater upheaval in the law than *Espinosa* was as Justice Grimes pointed out not nearly as significant as *Hitchcock* and *Lockett*.

The retroactive treatment of *Gideon v. Wainwright*, 372 U.S. 335 (1963), which extended the right to representation by counsel to felony defendants in state court, is also instructive. The Florida Supreme Court took up the matter of how to provide a means for convicted defendants to vindicate their Sixth Amendment rights identified in *Gideon*. *Roy v. Wainwright*, 151 So. 2d 825, 826 (Fla. 1963) ("As we read *Gideon*, the rule now simply is that the Sixth Amendment's guarantee of counsel is one of the fundamental rights essential to a fair trial."). In *Roy*, the Florida Supreme Court did express its "concern[] over the procedural facilities available to state prisoners who might have belatedly acquired rights which were not recognized at the time of their conviction." *Id*. The Department of Corrections reported that of the 8,000 state prisoners incarcerated in 1962, **over 4,000 of those state prisoners had entered guilty pleas without the benefit of counsel**, and **over another 475 state prisoners had entered pleas of not guilty and were convicted without the benefit of counsel**. Thus, well over half of those incarcerated in Florida prisons in 1962 were likely eligible to obtain relief on the basis of the *Gideon* violation in their cases. To preserve the effectiveness of judicial administration but still give retroactive effect to *Gideon*, the Florida Supreme Court adopted on April 1, 1963 (two weeks after the March 18, 1963 issuance of the opinion in *Gideon*) and made effective Criminal Procedural Rule 1. This rule provided a postconviction vehicle for seeking relief on the basis of *Gideon*, and was the forerunner of the current Rule 3.850 and Rule 3.851. *Id*. It is clear from *Roy* that the Florida Supreme Court accepted that the burden on the court system was an unavoidable fact in light of the ruling in *Gideon* and Florida's history of not guaranteeing counsel to all criminal defendants.

It is worth taking a moment to digest the information set forth in *Roy* regarding the impact of retroactive application of *Gideon*. Over 50 percent of the prison inmates incarcerated with Florida's Department of Corrections in 1962 were in prison as a result of criminal

proceedings in which they had not been provided counsel. The actual number of inmates in line to potentially benefit from retroactive application of *Gideon* was over 4,500. Presumably, the actual convictions were for a variety of crimes, all of which were seriousness enough to warrant incarceration in a Florida prison. The potential relief based upon retroactive application of *Gideon* was the vacation of the criminal conviction. Of course once having obtained relief, many of the *Gideon* beneficiaries would have had to stand trial, while others may have been able to work out better plea agreements with shorter sentences. But undoubtedly some of the prison inmates would have successfully had their conviction vacated and been released from prison on the basis of *Gideon*.

The effect of retroactive application of *Gideon* should be compared to the effect of retroactive application of *Hurst*. At most, *Hurst* would affect roughly 400 death-sentenced prisoners, not 4,500 prison inmates. The most benefit that a death-sentenced prisoner could obtain under *Hurst* is a life sentence without parole. Retroactive application of *Hurst* does not mean that anyone skates or goes free merely on the basis of *Hurst*. Depending upon the Florida Supreme Court's determination of the applicability of § 775.082(2), all 400 death row inmates could automatically receive life sentences. Under such a scenario, there would be no resentencings for any of the inmates benefiting from *Hurst.* There would be no further direct appeals on behalf of those inmates receiving life sentences. There would be no further Rule 3.851 proceedings for those inmates receiving life sentences, and no Rule 3.851 appeals. Certainly, some of the 400 death row inmates would nonetheless pursue guilt phase relief in Rule 3.850 proceedings; but, given that the Department of Corrections reported a prison population in 2014 of over 100,000 prisoners, the Rule 3.850 motions filed by not more than 400 former death

row inmates would have a miniscule impact, and would be more than offset in terms of the circuit courts' caseloads by the disappearance of Rule 3.851 proceedings.

Certainly if the Legislature enacts a new and constitutional capital sentencing scheme, there will be new death sentences resulting in a number of direct appeals over time and eventually Rule 3.851 proceedings. But as to the current 400 death row inmates, Rule 3.851 proceedings and appeals would absolutely dry up if § 775.082(2) is found to govern.

Even if § 775.082(2) is not found to govern and all 400 death row inmates received resentencings, retroactive application of *Hurst* would mean that it would be up to individual prosecutors to determine whether to actually seek another death sentence under some new legislatively adopted capital sentencing scheme. But given that prosecutors could simply agree to life sentences, there is no risk to the public at large. Again, compared to the enormous impact of the retroactive application of *Gideon*, the retroactive application of *Hurst* would be minimal.

A *Witt* analysis was recently conducted by the Florida Supreme Court in the non-capital context in *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015). In *Falcon v. State*, the Florida Supreme Court held that *Miller v. Alabama*, 132 S. Ct. 2455 (2012) applied retroactively in Florida under *Witt*. Falcon had been convicted of first-degree murder for a crime which occurred in 1997 when she was 15 years old. The law at the time required her to be sentenced to life without parole. Her conviction and sentence were affirmed on direct appeal in 2001.

After the U.S. Supreme Court issued its opinion in *Miller*, Falcon filed a postconviction motion to correct an illegal sentence and argued *Miller* should apply retroactively. The trial court denied the motion based on the First District's decision in *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st DCA 2012), which had held that *Miller* did not apply retroactively because it was a procedural ruling rather than a substantive change in law. On appeal, the First District affirmed,

relying on *Gonzalez*, but certified the following question of great public importance to the Florida Supreme Court: "Whether the rule established in *Miller v. Alabama* . . . , 'that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment,' should be given retroactive effect?" In deciding that *Miller* was entitled to retroactive effect under *Witt*, the Florida Supreme Court explained:

> As this Court stated in *Witt*, "**[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**'" Here, if *Miller* is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the *Miller* decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively.

162 So. 3d 954, 962 (Fla. 2015) (citations omitted) (emphasis added). If unfairness implicating a liberty interest demands retroactive application, then so too does unfairness implicating one's interest in life. If the unfairness of juveniles in indistinguishable cases receiving different non-capital sentences is too great, then so too is the unfairness of executing Mr. Lambrix while defendants with indistinguishable cases will receive the benefit of *Hurst* and not be put to death due to the timing of their cases. Certainly, there will be capital defendants with "indistinguishable cases" whose death sentences will be vacated and will thus receive lesser sentences simply because their convictions and sentences were not final when the *Hurst* decision issued. Such arbitrariness implicates not just the general due process notion of fairness, but also the Eighth Amendment principles enunciated in *Furman v. Georgia* that preclude the arbitrary imposition of the death penalty. Such patent unfairness requires that *Hurst* be applied retroactively.

b. The Florida Supreme Court's prior discussions regarding the retroactivity of *Apprendi* and *Ring* does not resolve or affect in any way the retroactivity of *Hurst*.

Apprendi v. New Jersey, 530 U.S. 466 (2000) requires that, without a jury finding of fact, a defendant cannot be "exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ring*, 536 U.S. at 586. *Ring* was the first time the *Apprendi* rule was applied to the finding of aggravators in a capital case. With regards to Arizona's death penalty scheme, the U.S. Supreme Court held in *Ring* that, pursuant to *Apprendi*, "a sentencing judge, sitting without a jury, [cannot] find an aggravating circumstance necessary for imposition of the death penalty." *Id*. at 609. The Florida Supreme Court, while failing to understand that *Apprendi* and *Ring* not only applied to Florida's capital sentencing scheme, but had rendered *Spaziano v. Florida* and *Hildwin v. Florida* overruled, engaged in a retroactive analysis of *Apprendi* in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), and of *Ring* in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). However, the *Witt* analyses in both *Hughes* and *Johnson* were infused with the Florida Supreme Court's failure to recognize that *Apprendi* and *Ring* did in fact apply in Florida, and as a result, Florida's capital sentencing scheme was unconstitutional. In neither *Hughes* nor *Johnson* did the Florida Supreme Court resolve the retroactivity of a decision by the United States Supreme Court declaring Florida's capital sentencing scheme unconstitutional.

In both *Hughes* and *Johnson*, the Florida Supreme Court assessed the impact of *Apprendi* and *Ring* while viewing *Hildwin v. Florida*, 490 U.S. 638 (1989) as still controlling law. *Hildwin* held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41. *Hurst* has specifically held that *Hildwin* is overruled. *Hurst*, 2016 WL 112683 at *7 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). In *Hurst*, the Supreme Court held that

Apprendi and *Ring* had washed away the logic underpinning of *Hildwin* and shown that the holdings of both *Hildwin* and *Spaziano v. Florida* were wrong. *Hurst,* 2016 WL 112683 at *8 ("Their conclusion was wrong, and irreconcilable with *Apprendi*.").

Hughes and *Johnson*, decided on the same day, both presumed the inapplicability of *Ring* in Florida in assessing the impact of *Apprendi* and *Ring* under *Witt*. Because the *Witt* analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the *Witt* analysis. Now that we know from *Hurst* that *Apprendi* applies to Florida's capital sentencing scheme and renders the scheme unconstitutional and caused *Hildwin* and *Spaziano* to be overruled, we must do a new assessment pursuant to *Witt*. *Hurst's* retroactivity in Florida must be assessed, not *Apprendi's*, which was not a capital case, and certainly not *Ring's*, which contemplated Arizona's sentencing scheme.

When the Florida Supreme Court adopted the *Witt* standard for retroactivity it specifically ruled that it was not bound by a federal standard. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980). The Florida Supreme Court found federal retroactivity law too restrictive, and crafted *Witt* specifically to provide greater, more expansive, more inclusive protection. *See Johnson*, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"); *see also Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting) (observing that the federal standard is "considerably more restrictive" than *Witt*).

The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems." *Id*. at 861 (Anstead, J., dissenting). *Teague* is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the

very rare case.'" *State v. Whitfield*, 107 S.W. 3d 253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." *Hughes*, 901 So. 2d at 862. Indeed, federal habeas courts, in capital cases, are directed to uphold state court decisions **that they find to be incorrect**, as long as there is some reasoning to support the incorrect ruling. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000). It would thus seem that some reasoning would be required on the part of state courts, but it is not. Federal habeas courts must supply their own reasoning, asking "what arguments or theories supported or . . . could have supported[] the state court's decision" *Harrington v. Richter*, 562 U.S. 86, 102, to support, and ultimately uphold **incorrect state court rulings supported by no reasoning at all**. The reason for this is that "requiring a statement of reasons [from state courts] could undercut state practices designed to preserve the integrity of the case-law tradition." *Id*. The goal is "deference and latitude" for state courts. *Id*. It is not to do justice on the facts. *Teague* arises from these same considerations and has been "universally criticized by legal commentators 'as being fundamentally unfair, internally inconsistent, and unreasonably harsh.'" *Hughes*, 901 So. 2d at 862 (Anstead, J., dissenting).

Thus, "[i]t would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague's* rationale is deference to a state's substantive law and review." *Hughes*, 901 So. 2d at 863 (Anstead, J., dissenting). On the contrary,

> [i]f anything, the more restrictive standards of federal review place **increased and heightened importance upon the quality and reliability of the state proceedings**. In other words, if the state proceedings become the only real venue for relief, as they in fact have become, it is critically important that the state courts provide that venue and "get it right" since those proceedings will usually be the final and only opportunity to litigate collateral claims. In fact, it is the presumed heightened quality of state proceedings that

> allows the federal courts to defer to the state proceedings as adequate safeguards to the rights of state prisoners. To then further restrict the state proceedings would undermine the entire rationale for restricting federal proceedings because of the reliability of state proceedings.

Id. at 863 (Anstead, J., dissenting). This nation's judicial system presumes that Florida courts will do justice, get it right, be hypersensitive to constitutional violations in the first instance, and require federal habeas review only in the rarest of cases. The reliability and confidence in Florida's judicial system depends on Florida courts being more protective of constitutional rights.

Florida cannot rely on federal habeas review to correct a denial of relief under *Hurst*, even if that denial is patently incorrect and has no reasoning to support it. The Florida Supreme Court is the last true line of defense against the unconstitutional execution of Florida defendants. Beyond this point, constitutional error and deprivations will be permitted out of respect for the Florida Supreme Court's judgment, fairness, and sovereignty unless that Court's decision is found to be more than merely wrong. In federal habeas federal courts must defer to the Florida Supreme Court and assume it had adequately functioned as the protector on the constitutional guarantees.

In *Cabana v. Bullock*, the U.S. Supreme Court acknowledged the role of state judicial systems as the primary line of defense against constitutional violations:

> First, to the extent that *Enmund* recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate. Accordingly, Bullock "is entitled to a determination [of the issue] in the state courts in accordance with valid state procedures." *Jackson v. Denno*, 378 U.S. 368, 393 (1964). Second, the State itself has "a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). **Considerations of**

> **federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants**. . . . **[I]t is Mississippi, therefore, not the federal habeas corpus court, which should first provide Bullock with that which he has not yet had and to which he is constitutionally entitled—a reliable determination** as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used.

474 U.S. 376, 390-91 (1986) (citations partially omitted) (emphasis added). In *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (emphasis added), the U.S. Supreme Court discussed how principles of equity and comity require federal courts not to interfere with state criminal cases:

> The precise reasons for this **longstanding public policy against federal court interference with state court proceedings** have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

In *Giles v. Maryland*, the U.S. Supreme Court indicated that states must not view federal review of state decisions as either a limitation on the scope of constitutional protections they should extend to their citizens or a crutch:

> **The truism that our federal system entrusts the States with primary responsibility in the criminal area means more than merely "hands off**." The States are bound by the Constitution's relevant commands but they are not limited by them. We therefore should not operate upon the assumption—especially inappropriate in Maryland's case in light of its demonstrated concern to afford post-conviction relief paralleling that which may be afforded by federal courts in habeas corpus proceedings—that state courts would not be concerned to reconsider a case in light of evidence such as we have here, particularly where the result may avoid unnecessary constitutional adjudication and minimize federal-state tensions.

386 U.S. 66, 81-82 (1967) (emphasis added) (footnote omitted).[30]

In *Hughes* and *Johnson*, Justice Anstead warned that the Florida Supreme Court in its retroactivity analysis in those cases "simply turned a blind eye to the most important and unique feature of the American justice system upon which we have relied for centuries to ensure fairness and justice for our citizens: the right to trial by jury." *Hughes*, 901 So. 2d at 858 (Anstead, J., dissenting), lamenting that "[n]o other right in our system has been so jealously guarded, until today." *Id*. (Anstead, J., dissenting).

With that being said, the fact of the matter is that *Hughes* and *Johnson* should have no bearing on this Court's assessment of *Hurst's* retroactivity because they both assessed the impact of *Apprendi* and *Ring* while the Florida Supreme Court assumed that *Hildwin v. Florida*, 490 U.S. 638 (1989) remained controlling law. In 1989, prior to both *Apprendi* and *Ring*, the U.S. Supreme Court held in *Hildwin* that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490

[30] It is hugely problematic that the *Hughes* Court "rel[ied] almost exclusively on federal decisions that evaluate retroactivity under the irrelevant and considerably more restrictive federal standard announced in the plurality opinion in *Teague* . . . ." *Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting). It is hugely problematic that the *Johnson* Court "[d]eferr[ed] to the United States Supreme Court's assessment of its own decision in *Ring*," *Johnson*, 904 So. 2d at 410, where "in *Schriro v. Summerlin*, 542 U.S. 348 (2004), [it found] that *Ring* does not apply retroactively for purposes of federal law. *Id*. at 408 (citation partially omitted).

U.S. at 640-41. The fact that the Florida Supreme Court did not see in *Johnson* that *Hildwin* did not survive *Apprendi* and *Ring* demonstrates that it did not appreciate the full ramifications of those decisions and the substantial upheaval in the law that they represented. In any event, the issue now is the retroactivity of *Hurst* knowing that *Hurst* concluded that *Bottoson v. Moore* was wrong and held that *Hiildwin* and *Spaziano* are overruled.

The Florida Supreme Court denied Linroy Bottoson's *Ring* claim four months after *Ring* issued, because "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (citing, *inter alia*, *Hildwin*). The Florida Supreme Court was guided by the U.S. Supreme Court's admonition in *Rodriguez de Quijas v. Shearson/American Express* that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the other courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. 477, 484 (1989) (brackets omitted); *see Bottoson*, 833 So. 2d at 695. Essentially, the Florida Supreme Court decided it would travel under *Hildwin*, despite the great shadow of doubt *Ring* cast over the constitutionality of Florida's death penalty scheme, until the U.S. Supreme Court specifically said otherwise. *Bottoson* did not result in a majority retroactivity ruling, but several justices wrote separately and addressed *Ring's* applicability in Florida.

Justice Wells saw no applicability because "[n]o United States constitutional law applicable to the Florida capital sentencing statute has been held by the Supreme Court of the United States to have changed."[31] *Bottoson*, 833 So. 2d at 696 (Wells, J., concurring) (citing his

[31] In a stroke of rather eerie foresight, Justice Wells confided that the U.S. Supreme Court's denial of stays to Bottoson and a companion-case defendant, King, "I cannot conclude that the United States Supreme Court would have permitted King and Bottoson to be executed if that

earlier dissent in the same case). Justice Quince agreed that "the Supreme Court has reserved for itself the prerogative of overruling cases which are directly controlling on a particular issue." *Id*. at 699 (Quince, J., concurring).

Justice Pariente agreed that "[b]ecause the United States Supreme Court in *Ring* neither overruled its prior precedent . . . nor explicitly addressed Florida's sentencing statute, I would not disturb the finality of Bottoson's death sentence." *Id*. at 719 (Pariente, J., concurring).

These views carried over into the Florida Supreme Court's consideration of *Ring's* retroactivity in *Johnson*:

> We first analyzed *Ring's* effect on Florida law in two plurality opinions, *Bottoson v. Moore* and *King v. Moore*. Both opinions noted that the United States Supreme Court repeatedly has upheld Florida's capital sentencing scheme. They also cited that Court's admonition that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Neither *Bottoson* nor *King*, however, garnered a majority. In fact, Chief Justice Pariente later recognized that "we have not yet as a Court determined whether *Ring* has any applicability to Florida's death penalty scheme or if so, whether any aspect of that holding would be retroactive to cases already final."

Johnson, 904 So. 2d at 406 (citations omitted) (alterations in original). The Florida Supreme Court could not fully consider the implications of *Ring* being applied in Florida while also being constrained by *Hildwin* to deny *Ring's* impact in this State.

Hughes and *Johnson* presumed the inapplicability of *Ring* in Florida in assessing the impact of *Ring* under *Witt*. In assessing the impact of *Ring* under *Witt*, where the impact and significance of the decision determines whether it rises to a level at which it should be

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court determined that *Ring* invalidated the death sentences imposed in these cases." *Bottoson*, 833 So. 2d at 697 (Wells, J., concurring). Yet, we now know that is precisely what happened.

retroactive, an understanding that the subject decision does not even apply in the State of Florida completely destroys the *Witt* analysis before it has even begun. The *Johnson* Court considered the retroactivity of a non-rule, with no effect in Florida. That case cannot be said to dictate the retroactivity of *Hurst*, a Florida-specific pronouncement unequalled by anything since *Furman*, if even by *Furman*. Now that we know from *Hurst* that *Apprendi* applies to Florida's capital sentencing scheme and rendered *Hildwin* and *Spaziano* unsustainable, a new *Witt* assessment mandates retroactive application of *Hurst*. When an assess *Hurst's* retroactivity in Florida is conducted unencumbered by the outdated and irrelevant analyses in *Hughes* and *Johnson*, it is clear that it is precisely the kind tectonic shift in the law that warrants retroactive application.

III. A motion under Rule 3.851 is the appropriate vehicle to raise claims pursuant to *Hurst*.

When *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, the Florida Supreme Court ultimately determined that *Hitchcock* claims required consideration of non-record evidence when evaluating the impact of *Hitchcock* on specific penalty phase proceedings. *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) (Florida's pre-*Hitchcock* law "precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstance"); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) ("according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction"). Accordingly, the Florida Supreme Court concluded that *Hitchcock* claims were required to be presented in Rule 3.850 motions. *Hall v. State*, 540 So. 2d at 1128 ("We hold, therefore, that *Hitchcock* claims should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings."); *Meeks v. Dugger*, 576 So. 2d at 716 ("*Hitchcock* claims should now be raised by motion for postconviction relief.

However, Meeks' petition for habeas corpus was filed before our decision in *Hall*. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the *Hitchcock* allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850.").

Akin in a way to *Hitchcock*, *Hurst* has enormous implications for how trial counsel would approach a capital trial, and in particular the penalty phase proceeding. By changing who decides the facts necessary for death eligibility and by treating those facts as elements of the offense of capital murder, the decision in *Hurst* also changes the strategies that trial counsel in Florida would employ in a capital trial. Counsel must investigate by speaking with trial attorneys regarding how *Hurst* would change how the penalty phase was conducted. This kind of investigation requires time as it did in the post-*Hitchcock* cases. It also requires evidentiary development. For example, on its face, *Hurst* holds that a jury's decision as to the facts necessary under Florida statutes for rendering death eligible must be conclusive, not advisory. Certainly, this would cause trial counsel to object to any instructions informing a jury that its penalty phase decision is advisory. Trial counsel would undoubtedly go further in this regard and emphasize to the jury its responsibility for a death sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Certainly, there are trial attorneys available to testify to this; but under the time parameters set by this Court, counsel does not have time to develop this except in the most rudimentary fashion.

IV. Conclusion

Mr. Lambrix's Rule 3.851 motion presents substantial claims challenging the validity of his convictions and sentences, including his sentence of death. Mr. Lambrix requests the opportunity to be heard on his Rule 3.851 motion. Fla. R. Crim. P. 3.851(f)(5)(B); *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

Mr. Lambrix requests an evidentiary hearing. Through this pleading, Mr. Lambrix

demonstrates that he is entitled to an evidentiary hearing on the claims raised herein. Moreover, at an evidentiary hearing, Mr. Lambrix can prove he is entitled to the relief he seeks. The files and records in this case fail to show conclusively that Mr. Lambrix is entitled to no relief. *See Lemon v. State*, 498 So. 2d 923 (Fla. 1986) (citing *State v. Crews*, 477 So. 2d 984 (Fla. 1984); O'*Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984)). Mr. Lambrix disputes factual issues with non-record proof. Accordingly, an evidentiary hearing is required. Mr. Lambrix's claims require a factual determination. Accordingly, an evidentiary hearing should be held on Mr. Lambrix's claims, after which the relief sought herein should be granted.

CONCLUSION AND RELIEF SOUGHT

Mr. Lambrix prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1. That he be allowed to supplement and/or amend this motion should new claims, facts, or legal precedent become available to counsel;

2. That he be allowed to reply to any state response to the instant motion;

3. That a case management conference/*Huff* hearing be scheduled following Mr. Lambrix's reply for legal argument on all the claims;

4. That an evidentiary hearing be scheduled so as to allow him to present support for his claims, and that such a hearing be conducted at a reasonable time; and, on the basis of the reasons presented herein;

5. That a stay of execution be granted; and

6. That his convictions and sentences, including his sentence of death, be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-Portal Filing to all counsel of record on this _____ day of _____, 2016.

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APPENDIX _A_

Florida Supreme Court Decisions
Citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002),
To Reject Claims Based on *Ring* or *Apprendi*

1. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005)

2. *Duest v. State*, 855 So. 2d 33 (Fla. 2003)

3. *Windom v. State*, 886 So. 2d 915 (Fla. 2004)

4. *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003)

5. *Butler v. State*, 842 So. 2d 817 (Fla. 2003)

6. *Anderson v. State*, 841 So. 2d 390 (Fla. 2003)

7. *Franklin v. State*, 965 So. 2d 79 (Fla. 2007)

8. *Nelson v. State*, 850 So. 2d 514 (Fla. 2003)

9. *Belcher v. State*, 851 So. 2d 678 (Fla. 2003)

10. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005)

11. *Peterson v. State*, 94 So. 3d 514 (Fla. 2012)

12. *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003)

13. *Cole v. State*, 841 So. 2d 409 (Fla. 2003)

14. *Guardado v. State*, 965 So. 2d 108 (Fla. 2007)

16. *Kormondy v. State*, 845 So. 2d 41 (Fla. 2003)

17. *Frances v. State*, 970 So. 2d 806 (Fla. 2007)

18. *Fennie v. State*, 855 So. 2d 597 (Fla. 2003)

19. *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)

20. *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006)

21. *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004)

22. *Owen v. State*, 862 So. 2d 687 (Fla. 2003)

23. *Dufour v. State*, 905 So. 2d 42 (Fla. 2005)

24. *Banks v. State*, 842 So. 2d 788 (Fla. 2003)

25. *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003)

26. *Rivera v. State*, 859 So. 2d 495 (Fla. 2003)

27. *Blackwelder v. State*, 851 So. 2d 650 (Fla. 2003)

28. *Merck v. State*, 975 So. 2d 1054 (Fla. 2007)

29. *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003)

30. *Jones v. State*, 855 So. 2d 611 (Fla. 2003)

31. *McCoy v. State*, 853 So. 2d 396 (Fla. 2003)

32. *Taylor v. State*, 937 So. 2d 590 (Fla. 2006)

33. *Davis v. State*, 875 So. 2d 359 (Fla. 2003)

34. *Lugo v. State*, 845 So. 2d 74 (Fla. 2003)

35. *Patton v. State*, 878 So. 2d 368 (Fla. 2004)

36. *Jones v. State*, 845 So. 2d 55 (Fla. 2003)

37. *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002)

38. *England v. State*, 940 So. 2d 389 (Fla. 2006)

39. *Cooper v. State*, 856 So. 2d 969 (Fla. 2003)

40. *Conahan v. State*, 844 So. 2d 629 (Fla. 2003)

41. *Lebron v. State*, 982 So. 2d 649 (Fla. 2008)

42. *Gore v. State*, 964 So. 2d 1257 (Fla. 2007)

43. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014)

44. *Reed v. State*, 875 So. 2d 415 (Fla. 2004)

45. *Henry v. State*, 862 So. 2d 679 (Fla. 2003)

46. *Abdool v. State*, 53 So. 3d 208 (Fla. 2010)

47. *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006)

48. *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003)

49. *Hamilton v. State*, 875 So. 2d 586 (Fla. 2004)

50. *Oyola v. State*, 99 So. 3d 431 (Fla. 2012)

51. *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004)

52. *Gamble v. State*, 877 So. 2d 706 (Fla. 2004)

53. *Stewart v. Crosby*, 880 So. 2d 529 (Fla. 2004)

54. *Howell v. State*, 877 So. 2d 697 (Fla. 2004)

55. *Grim v. State*, 841 So. 2d 455 (Fla. 2003)

56. *Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004)

57. *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002)

58. *Jean-Philippe v. State*, 123 So. 3d 1071 (Fla. 2013)

59. *Nixon v. State*, 2 So. 3d 137 (Fla. 2009)

60. *Wainwright v. State*, 896 So. 2d 695 (Fla. 2004)

61. *Lucas v. State*, 841 So. 2d 380 (Fla. 2003)

62. *Martin v. State*, 151 So. 3d 1184 (Fla. 2014)

63. *Johnson v. State*, 903 So. 2d 888 (Fla. 2005)

64. *Hilton v. State*, 117 So. 3d 742 (Fla. 2013)

65. *Foster v. State*, 929 So. 2d 524 (Fla. 2006)

66. *State v. Duncan*, 894 So. 2d 817 (Fla. 2004)

67. *Henyard v. State*, 883 So. 2d 753 (Fla. 2004)

68. *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013)

69. *Caylor v. State*, 78 So. 3d 482 (Fla. 2011)

70. *Kimbrough v. State*, 886 So. 2d 965 (Fla. 2004)

71. *Poole v. State*, 997 So. 2d 382 (Fla. 2008)

72. *Knight v. State*, 76 So. 3d 879 (Fla. 2011)

73. *Hernandez-Alberto v. State*, 889 So. 2d 721 (Fla. 2004)

74. *Guzman v. State*, 868 So. 2d 498 (Fla. 2003)

75. *Belcher v. State*, 961 So. 2d 239 (Fla. 2007)

76. *Kokal v. State*, 901 So. 2d 766 (Fla. 2005)

77. *Pace v. State*, 854 So. 2d 167 (Fla. 2003)

78. *Power v. State*, 886 So. 2d 952 (Fla. 2004)

79. *Marquard v. State*, 850 So. 2d 417 (Fla. 2002)

80. *Wright v. State*, 857 So. 2d 861 (Fla. 2003)

81. *Schoenwetter v. State*, 931 So. 2d 857 (Fla. 2006)

82. *McKenzie v. State*, 29 So. 3d 272 (Fla. 2010)

83. *Brown v. State*, 143 So. 3d 392 (Fla. 2014)

84. *Johnson v. State*, 921 So. 2d 490 (Fla. 2005)

85. *Zack v. State*, 911 So. 2d 1190 (Fla. 2005)

86. *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003)

87. *Spencer v. State*, 842 So. 2d 52 (Fla. 2003)

88. *Jackson v. State*, 2015 WL 5036349 (Fla. Aug. 27, 2015)

89. *Serrano v. State*, 64 So. 3d 93 (Fla. 2011)

90. *Cave v. State*, 899 So. 2d 1042 (Fla. 2005)

91. *Chavez v. State*, 832 So. 2d 730 (Fla. 2002)

92. *Crain v. State*, 894 So. 2d 59 (Fla. 2004)

93. *Ault v. State*, 53 So. 3d 175 (Fla. 2010)

94. *Middleton v. State*, 2015 WL 6387760 (Fla. Oct. 22, 2015)

95. *Rigterink v. State*, 66 So. 3d 866 (Fla. 2011)

96. *Campbell v. State*, 159 So. 3d 814 (Fla. 2015)

97. *Pietri v. State*, 885 So. 2d 245 (Fla. 2004)

98. *Perez v. State*, 919 So. 2d 347 (Fla. 2005)

99. *Jackson v. State*, 127 So. 3d 447 (Fla. 2013)

100. *Sochor v. State*, 883 So. 2d 766 (Fla. 2004)

101. *Taylor v. State*, 855 So. 2d 1 (Fla. 2003)

102. *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014)

103. *Overton v. State*, 976 So. 2d 536 (Fla. 2007)

104. *Peterka v. State*, 890 So. 2d 219 (Fla. 2004)

105. *Kalisz v. State*, 124 So. 3d 185 (Fla. 2013)

106. *Martin v. State*, 107 So. 3d 281 (Fla. 2012)

107. *Gosciminski v. State*, 132 So. 3d 678 (Fla. 2013)

108. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005)

109. *Hodges v. State*, 885 So. 2d 338 (Fla. 2004)

110. *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006)

APPENDIX B__

Florida Supreme Court Decisions
Citing *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001),
To Reject Claims Under *Ring* or *Apprendi*

1. *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001)

2. *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001)

3. *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)

4. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005)

5. *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002)

6. *King v. State*, 808 So. 2d 1237 (Fla. 2002)

7. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002)

8. *Looney v. State*, 803 So. 2d 656 (Fla. 2001)

9. *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002)

10. *Hertz v. State*, 803 So. 2d 629 (Fla. 2001)

11. *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002)

APPENDIX C__

Florida Supreme Court Decisions
Relying On *Spaziano v. Florida*, 468 U.S. 447 (1984),
To Reject Arguments That The Florida Capital Sentencing Scheme
Is Unconstitutional

1. *Spaziano v. Dugger*, 584 So. 2d 1 (Fla. 1991)

2. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005)

3. *Spaziano v. State*, 489 So. 2d 720 (Fla. 1986)

4. *Combs v. State*, 525 So. 2d 853 (Fla. 1988)

5. *Grossman v. State*, 525 So. 2d 833 (Fla. 1988)

6. *Brown v. State*, 473 So. 2d 1260 (Fla. 1985)

7. *Buford v. State*, 492 So. 2d 355 (Fla. 1986)

8. *Smith v. State*, 515 So. 2d 182 (Fla. 1987)

9. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991)

10. *Parker v. State*, 458 So. 2d 750 (Fla. 1984)

11. *Provenzano v. State*, 497 So. 2d 1177 (Fla. 1986)

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

13. *Craig v. State*, 510 So. 2d 857 (Fla. 1987)

14. *Frances v. State*, 970 So. 2d 806 (Fla. 2007)

15. *State v. Steele*, 921 So. 2d 538 (Fla. 2005)

16. *Rigterink v. State*, 66 So. 3d 866 (Fla. 2011)

17. *Suggs v. State*, 923 So. 2d 419 (Fla. 2005)

18. *Gosciminski v. State*, 132 So. 3d 678 (Fla. 2013)

APPENDIX_D_

Florida Supreme Court Decisions
Citing *Hildwin v. Florida*, 490 U.S. 638 (1989),
To Reject Claims Based on Ring or Apprendi

1. *Franklin v. State*, 965 So. 2d 79 (Fla. 2007)

2. *Frances . State*, 970 So. 2d 806 (Fla. 2007)

3. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014)

4. *State v. Steele*, 921 So. 2d 538 (Fla. 2005)

5. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005)

6. *Rigterink v. State*, 66 So. 3d 866 (Fla. 2011)

7. *Gosciminski v. State*, 132 So. 3d 678 (Fla. 2013)

8. *Suggs v. State*, 923 So. 2d 419 (Fla. 2005)

9. *Randolph v. State*, 562 So. 2d 1141 (Fla. 1990)

10. *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996)

11. *Walker v. State*, 707 So. 2d 300 (Fla. 1997)

12. *Mann v. State*, 603 So. 2d 1141 (1992)