IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v. Case No. SC17-847

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW the Appellant, Donald Dillbeck ("Dillbeck"), through undersigned counsel, and files this Response to the Order to Show Cause issued September 25, 2017 in the above-styled case.

Relevant Facts and Procedural History

1. Dillbeck was convicted of first-degree murder, armed robbery and armed burglary, and sentenced to death. The convictions and sentence were affirmed on direct appeal in 1994. *Dillbeck v. State,* 643 So. 2d 1027 (Fla. 1994).

2. Following several unsuccessful postconviction challenges, Dillbeck filed on April 11, 2016 a "Second Successive Motion for Postconviction Relief under Fla. R. Crim. P. 3.851 ("motion"), raising a single claim that his death sentence violates the Sixth Amendment right to trial by jury and Eighth Amendment right to unanimous jury verdict based on *Hurst v. Florida,* 136 S. Ct.

616 (2016) (Hurst I) and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) (Hurst II).

3. On December 22, 2016, during the pendency of Dillbeck's motion in the Circuit Court, this Court held in *Asay v. State,* 210 So. 3d 1 (Fla. 2016), that the *Hurst* decisions do not apply retroactively to any defendant whose death sentence was imposed and became final prior to the United States Supreme Court's decision in *Ring v. Arizona* on June 24, 2002. In *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), this Court held that *Hurst* does apply retroactively to death sentences that became final after *Ring.*

4. On January 23, 2017, Dillbeck filed a supplemental memorandum of law setting forth various arguments for applying *Hurst* notwithstanding the cut-off date established in *Asay* and *Mosley.*

5. Following a status hearing, the Circuit Court entered a final order denying the motion on non-retroactivity grounds on April 11, 2017.

6. Dillbeck timely appealed the Circuit Court's order to this Court. The record ("R") was filed on May 26, 2017.

7. On June 5, 2017, the Court entered an order to stay this appeal pending a decision in *Hitchcock v. State,* Case No. SC17-445.

8. On August 10, 2017, the Court entered an opinion disposing of the Hitchcock case. *Hitchcock v. State*, 2017 WL 3431500 (Fla. August 10, 2017).

9. On September 25, 2017, the Court entered an order directing Dillbeck to show cause why this appeal should not be dismissed in light of the *Hitchcock* decision. This response follows.

Why the Order to Show Cause Should be Discharged

The order to show cause should be discharged because this appeal presents two issues that were not litigated or decided in *Hitchcock,* and which are not subject to any procedural bar. *See generally State v. McBride,* 848 So. 2d 287 (Fla. 2003) (discussing issue and claim preclusion). Article I, Section 21 of the Florida Constitution guarantees the right of access to the courts to every person.

Two issues to be presented in this appeal that were not decided in *Hitchcock* are (1) whether *Hurst II*, which requires a penalty phase jury to make new findings unanimously and beyond a reasonable doubt, announced a new substantive rule of criminal law independent of *Hurst I* that must be applied retroactively, and (2) whether this Court's retroactivity cut-off date is arbitrary and results in the disparate application of the death penalty based on impermissible factors.

Why this case presents issues not decided in Hitchcock

Dillbeck filed his *Hurst* claim in a successive motion for postconviction relief under Fla. R. Crim. P. 3.851 on April 11, 2016 (R. 127), prior to this Court's determination of whether and to what extent the *Hurst* decisions apply retroactively. In the motion, Dillbeck made a standard retroactivity argument under

Witt v. State, 387 So. 2d 922 (Fla. 1980) (R. 134-138). In *Asay* and *Mosley,* the Court engaged in separate *Witt* analyses for defendants who were sentenced to death prior to *Ring* and those sentenced after *Ring.*

After this Court established a cut-off date for retroactivity at the date of the *Ring* decision, Dillbeck filed a supplemental pleading setting forth three arguments why *Hurst* should be applied to his case notwithstanding *Asay.* Dillbeck's arguments were (1) that it would be fundamentally unfair not to apply *Hurst* to Dillbeck for the reasons set forth in *James v. State,* 615 So. 2d 668 (Fla. 1993), and *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), because Dillbeck raised issues at trial similar to those decided in *Hurst* (R. 159-164), (2) *Hurst II,* which established an Eighth Amendment right to a unanimous jury verdict in capital sentencing proceedings and assigned a burden of proof beyond a reasonable doubt to the jury's findings, announced a new substantive rule of criminal law that must be applied retroactively to all defendants, including those sentenced to death prior to the *Ring* decision (R. 164-168), and (3) *Hurst* meets the federal test for retroactivity under *Stovall v. Denno* and *Linkletter v. Walker* (R. 159 n.10). Dillbeck also argued that his sentence was imposed arbitrarily without the individualized sentencing guaranteed by the Eighth Amendment (R. 166).

The initial brief filed in *Hitchcock* raised the fundamental fairness and federal retroactivity arguments. However, the question of whether *Hurst II*

announced a new substantive rule of criminal law was not raised as a stand-alone basis for applying *Hurst* retroactively[1], nor did this Court address that issue in its opinion[2]. To date, this Court has not expressly addressed this question in any Florida case. *Asay* and *Mosley* only applied the test for retroactivity of new procedural rules.

Furthermore, although Hitchcock raised Eighth Amendment arguments, he did not assert that the June 24, 2002 retroactivity cut-off date is arbitrary and results in disparate treatment of similarly situated prisoners, nor did this Court address that issue in its opinion. Therefore, this Court's decision in *Hitchcock* does not bar consideration of these two questions.

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[1] Hitchcock only argued substantive law in the context of his federal retroactivity argument, asserting *inter alia* that the Sixth Amendment right announced in *Hurst I* is substantive.

[2] As framed by the Court, the arguments presented in *Hitchcock* were (1) The Hurst error in his case was not harmless because his jury did not unanimously recommend death; (2) denying Hitchcock Hurst relief based on non-retroactivity violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution; (3) Hitchcock was denied his right to a jury trial on the facts that led to his death sentence; (4) Hitchcock's death sentence violates the Eighth Amendment because it was contrary to evolving standards of decency and is arbitrary and capricious; (5) the fact-finding that subjected Hitchcock to death was not proven beyond a reasonable doubt; (6) Hitchcock's death sentence violates Article I, Sections 15(a) and 16(a) of the Florida Constitution because the State did not present the aggravating factors in his indictment, and the aggravating factors were not found by his grand jury, thereby denying him notice of the full nature and cause of the accusation against him; and (7) the denial of Hitchcock's prior postconviction claims must be reheard and determined under a constitutional framework. *Hitchcock v. State,* 2017 WL 3431500 at *1 n.2 (Fla. August 10, 2017).

1. Why *Hurst II* Announced a New Substantive Rule of Law

In *Hurst v. Florida,* the United States Supreme Court held that Florida's death penalty scheme violated the Sixth Amendment right to trial by jury. *Hurst I,* 136 S. Ct. at 622. Both the U.S. Supreme Court and this Court have characterized the Sixth Amendment jury trial right in capital sentencing as procedural and held that it is not retroactive. *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004); *Johnson v. State,* 904 So. 2d 400 (Fla. 2005). Rules that merely allocate decision-making authority are prototypical procedural rules. *Summerlin,* 124 S. Ct. at 2523.

However, this Court's decision in *Hurst II* was not limited to the Sixth Amendment jury trial right. The Court also imposed a unanimous jury verdict requirement on Eighth Amendment grounds, and assigned a burden of proof beyond a reasonable doubt to all of the factual findings required by § 921.141. For the reasons that follow, both of these new rules are substantive rather than procedural in nature. As a result, the Court's *Witt* analysis of the procedural rules announced in *Ring* and *Hurst I,* which concerned only the Sixth Amendment right to trial by jury, is not dispositive of whether the rules announced in *Hurst II* should be applied retroactively to all cases.

By definition, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004); *Welch v. United States,* 136 S. Ct. 1257, 1265

(2016). Regardless of whether the underlying constitutional guarantee is characterized as procedural or substantive, if the function of the rule is to alter the class of persons that the law punishes, the rule is substantive. *Id* at 1266; *see also Montgomery v. Louisiana,* 136 S. Ct. 718, 728 (2016) (stating that "substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'").

In *Hurst II,* this Court imposed a requirement that, under the Eighth Amendment, a capital sentencing jury's factual findings and recommendation of death must be unanimous. *Hurst II,* 202 So. 3d at 44. Citing *Furman v. Georgia,* 92 S. Ct. 2726 (1972), the Court reasoned that the Eighth Amendment forbids arbitrary imposition of the death penalty and requires individualized sentencing in which the discretion of the jury and the judge will be narrowly channeled. *Id* at 56. The purpose of individualized sentencing is to establish a system "that narrows the class of murders and murderers for which the death penalty is appropriate…" *Id* at 57 (emphasis added). The Court then stated:

> Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed.
>
> * * *
>
> As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to

> impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

Id at 60 (emphasis added).

Thus, the Court's stated reason for imposing the new rules announced in *Hurst II* was to further narrow the class of persons subject to punishment by death. This is the very definition of a substantive rule. In fact, the language that this Court used in the *Hurst II* opinion is virtually indistinguishable from the definition of a substantive rule of law in both state and federal jurisprudence.

As in all cases announcing a new substantive rule, both the purpose and the effect of the new rule announced in *Hurst II* is to alter the class of persons whom the law punishes, not merely by shifting the role of factfinder from judge to jury, but also by adding new factual findings for the jury to make by unanimous verdict, and a requirement that the ultimate recommendation of death must be unanimous rather than by a mere majority vote. Requiring all twelve jurors to agree that a defendant should be put to death will ensure that the death penalty is truly reserved for the most aggravated and least mitigated of murders.

In addition, this Court in *Hurst II* also assigned a burden of proof beyond a reasonable doubt to the additional findings that the jury is now required to make. First, the jury must find the existence of each aggravating factor beyond a reasonable doubt. *Id* at 44. In addition, the Court indicated in a footnote that the jury's finding that the aggravating factors are sufficient for death is also subject to the standard of proof beyond a reasonable doubt. *Id* at 62 n.18.

This stands in stark contrast to the old rule, which only required the judge to find that the aggravating factors were "not outweighed" by the mitigating evidence. *See Williams v. State,* 967 So. 2d 735, 761 (Fla. 2007) (upholding death sentence despite lack of any express finding that aggravators were sufficient for death). At most, this was a preponderance of the evidence standard when it came to weighing the aggravating factors. Therefore, this Court's ruling in *Hurst II* made additional findings essential to the death penalty and increased the State's burden of proof. These requirements serve a narrowing function and are substantive.

Historically, new rules of law that apply the standard of proof beyond a reasonable doubt are substantive and apply retroactively. *See e.g. Hankerson v. North Carolina*, 97 S. Ct. 2339, 2344-45 (1977) (applying rule of *Mullaney v. Wilbur,* which requires states to prove all elements of crime beyond a reasonable doubt without using presumptions to shift burden to defendant, retroactively to all cases in order to "diminish the probability that an innocent person would be

convicted"); *Ivan V. v. City of New York,* 92 S. Ct. 1951, 1952 (1972) (applying rule announced in *In re Winship,* which applied standard of proof beyond a reasonable doubt to juvenile prosecutions, retroactively to all cases). The rule announced in *Hurst II* should be applied in the same fashion.

One state supreme court has already held that the rule it announced in response to *Hurst I* applies retroactively to all postconviction cases because it allocates the burden of proof. In *Rauf v. State*, the Delaware Supreme Court held that the state's capital sentencing statute was unconstitutional under *Hurst I* because it failed to require juror unanimity, allowed the judge to weigh the aggravating and mitigating circumstances, and did not require a finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *Rauf v. State,* 145 A. 3d 430, 433-434 (Del. 2016).

In *Powell v. Delaware,* 153 A. 3d 69 (Del. 2016), the court then confronted the issue of whether the new rule announced in *Rauf* should be applied retroactively. Citing *Ivan V.,* the court reasoned that increasing the burden of proof from the preponderance of the evidence standard to a beyond a reasonable doubt standard implicates fact-finding reliability under the Due Process Clause, without which the truth-finding function of a criminal trial is substantially impaired. *Id* at 75. *Powell* quoted the following language from *Ivan V:*

> *Winship* expressly held that the reasonable-doubt standard "is a prime instrument for reducing the risk of

> convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' … 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of … convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

Ivan V., 92 S. Ct. at 1952.

Powell was decided on Sixth Amendment grounds, and the court characterized the new rule as a watershed rule of criminal procedure. *Id* at 74-75. However, the retroactivity ruling was clearly premised in large part on the fact that *Rauf* assigned a burden of proof beyond a reasonable doubt to the jury's findings.

Rauf is persuasive authority. In Florida, the assignment of a burden of proof beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient to warrant a death sentence is akin to Delaware's requirement that the jury find that the aggravating factors outweigh the mitigating factors by the same standard. In both cases, the higher standard of proof installs procedural safeguards rooted in due process that increase the reliability of the truth-finding function and perform a narrowing function that alters the class of persons who will be sentenced to death. For the reasons espoused in *Ivan V.,* these rules should be applied equally

to all capital defendants, including those sentenced to death prior to the announcement of the rule.

Justice Pariente's dissent in *Hughes v. State* illustrates the substantive nature of a rule imposing a burden of proof:

> Two aspects of *Apprendi* are relevant to a determination of retroactivity. The first concerns the identity of the decisionmaker, and is a function of the Sixth Amendment right to trial by jury. The second concerns the burden of proof, and is governed by the Fifth and Fourteenth Amendments' guarantee of due process of law.
>
> I conclude that the determination in *Apprendi* that facts authorizing a particular sentence must be found beyond a reasonable doubt is a new rule of substantive law that warrants retroactive application under *Witt.*

Hughes v. State, 901 So. 2d 837, 851 (Fla. 2005) (Pariente, J., dissenting).

The rule announced in *Hurst II* is substantive because it was intended to narrow the class of murder defendants who are eligible for the death penalty to those cases where all twelve jurors unanimously agree that the State has proven sufficient aggravating factors beyond a reasonable doubt. The prior rule allowed the judge to find by a preponderance of the evidence that the aggravating factors were not outweighed by the mitigation, and allowed the jury to recommend death by a bare majority vote of seven to five. Thus, the new rule does more than merely allocate decision-making authority, and is distinguished from the rule announced in *Hurst I.*

It is well established as a matter of both state and federal law that new substantive rules of constitutional law in criminal cases apply retroactively to all cases. In *Montgomery v. Louisiana,* the U.S. Supreme Court stated that "courts must give retroactive effect to new substantive rules of constitutional law," which are not subject to the general bar against retroactivity. *Montgomery v. Louisiana,* 136 S. Ct. 718, 728 (2016). The Supreme Court reasoned as follows:

> It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

Id at 731.

Just last year in *Walls v. State,* this Court reaffirmed that a new substantive rule that places beyond the authority of the state the power to regulate certain conduct or impose certain penalties constitutes a development of fundamental significance that applies retroactively to all final cases. *Walls v. State,* 213 So. 3d 340 (Fla. 2016). Because this Court's ruling in *Hurst II* serves the narrowing function endemic to substantive rules, it applies to all cases.

2. Why this Court's retroactivity cut-off date is arbitrary and capricious, and violates the Eighth and Fourteenth Amendments

Dillbeck's death sentence became final by the conclusion of direct review on March 20, 1995, when the U.S. Supreme Court denied certiorari. *Dillbeck v. Florida,* 514 U.S. 1022 (1995). To date, this Court has determined that the *Hurst*

decisions are important enough to apply retroactively, but only for those defendants whose death sentences became final after June 24, 2002. *Mosley,* 209 So. 3d 1248; *Asay,* 210 So. 3d 1. The justification for this cut-off date is that this is the date of the U.S. Supreme Court's decision in *Ring v. Arizona,* 122 S. Ct. 2428 (2002), and was the first time the Sixth Amendment right to trial by jury was applied to capital sentencing and Florida's scheme was rendered unconstitutional. *See Asay,* 210 So. 3d at 22; *Mosley,* 209 So. 3d at 1280-81. The Court's separate *Witt* analyses turn on the extent of reliance on the old rule both before and after *Ring,* and the impact on the administration of justice.

This cut-off date is arbitrary, and results in the arbitrary and disparate application of the death penalty upon similarly situated defendants in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Rather than drawing a distinction based on the nature of the offense or the character of the defendant, the Court has drawn a distinction that in many cases is the result of random chance or unforeseen procedural delays, or intentionally dilatory tactics to delay an appeal, factors which have no bearing on whether the case actually merits the death penalty. The Court acknowledged this problem in *Witt,* 387 So. 2d at 926-27, one which is significantly worsened by an incomplete retroactivity ruling.

For example, in *Lugo v. State,* Case No. SC60-93994, the defendant was sentenced to death in 1998, prior to the *Ring* decision, but the docket shows that

there were ten extensions of time filed for preparation of the transcripts. As a result, there was a nearly two-year delay in filing the record on appeal, followed by more extensions of the briefing schedule that caused yet another year of delay. This resulted in the conviction and death sentence being affirmed on February 20, 2003, after the retroactivity cut-off date. *Lugo v. State,* 845 So. 2d 74 (Fla. 2003). Because of this fortuitous sequence of events, Mr. Lugo is entitled to relief under *Hurst.* Had Lugo prosecuted his appeal in a timely manner, his sentence would have become final before the cut-off date and he would be barred.

In *Looney v. State,* the defendant was sentenced to death in 2000 and the sentence was affirmed in 2001, also pre-*Ring. Looney v. State,* 803 So. 2d 656 (Fla. 2001). However, Looney sought certiorari in the United States Supreme Court, which was denied on June 28, 2002. *Looney v. Florida,* 536 U.S. 966 (2002). Solely because the Supreme Court denied certiorari four days after the decision in *Ring,* Mr. Looney is entitled to apply *Hurst* retroactively to his case.

Even defendants whose death sentences were affirmed by this Court on the same day are receiving disparate treatment. On October 11, 2001, this Court affirmed the death sentences of James Card and Gary Bowles on direct appeal. *Card v. State,* 803 So. 2d 613 (Fla. 2001); *Bowles v. State,* 804 So. 2d 1173 (Fla. 2001). However, the U.S. Supreme Court denied Bowles' certiorari petition on June 17, 2002, *Bowles v. Florida,* 536 U.S. 930 (2002), and denied Card's

certiorari petition on June 28. *Card v. Florida,* 536 U.S. 963 (2002). Based solely on this minor procedural variance, Mr. Bowles is ineligible for relief and will be put to death while Mr. Card has already had his death sentence vacated. *Card v. State,* 219 So. 3d 47 (Fla. 2017).

The actual age of the case also has little bearing on the Court's arbitrary cut-off date. One of the justifications for not applying *Hurst* retroactively to older cases was the impact on the administration of justice and the difficulty in retrying cases that arose long ago. *See Asay,* 210 So. 3d at 20-21. However, many of these older cases have already been retried due to unrelated errors, resulting in death sentences that became final after the cut-off date. *See e.g. Johnson v. State,* 205 So. 3d 1285 (Fla. 2016) (granting *Hurst* relief to defendant who was sentenced to death in 1981 but retried in 2010); *Parker v. State,* 873 So. 2d 270 (Fla. 2004) (affirming second death sentence of defendant originally tried in 1982 after cut-off date).

To the extent the passage of time makes retrials more problematic, it will be far more difficult to locate witnesses to a murder that was tried in 1981 or 1982 than one tried in the 1990s or early 2000s. As a result, the cut-off date is both over-inclusive and under-inclusive as a means of promoting the administration of justice. The cut-off date still allows *Hurst* to be applied to very old cases that have been retried post-*Ring* and which will be difficult to retry again, but denies relief to newer cases that might be easily retried.

Making *Hurst* retroactive only to the date of the *Ring* decision also unfairly denies relief to defendants who were sentenced to death after the decision in *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000), but whose death sentences became final prior to *Ring*. *Ring* was an extension of the rule announced in *Apprendi* that any fact which increases the maximum punishment for a crime is an offense element that must be submitted to the jury and proven beyond a reasonable doubt. *Id* at 2362-63. In both *Ring* and *Hurst I,* the Supreme Court cited *Apprendi* as the foundation for its decision. *See Ring,* 122 S. Ct. at 588-89; *Hurst I,* 136 S. Ct. at 621. Despite this fact, defendants who correctly argued that *Apprendi* should be extended to penalty phase jury fact-finding between 2000 and 2002 are barred from seeking relief under *Hurst.*

The Eighth Amendment demands that the decision to impose or not impose the death penalty be based on an individualized sentencing determination that takes into account the circumstances of the offense and the character of the accused. *Gregg v. Georgia,* 96 S. Ct. 2909, 2932 (1976). However, to then make an arbitrary determination of which defendants will have their death sentences actually carried out based on impermissible factors defeats this constitutional guarantee. To determine who lives and who dies based on random procedural vagaries as shown in the cases cited above violates the constitutional guarantee against the whimsical and inconsistent application of the death penalty. In *Witt,*

this Court established a test that makes new rules applicable to all defendants on postconviction relief or none at all. The purpose of abridging the doctrine of finality is to ensure, particularly in cases involving the death penalty, that the law is applied uniformly. *See Witt,* 387 So. 2d at 925 ("A determination that a new principle of law should be *fully* retroactive" involves a balancing of the interests in fairness and uniformity with decisional finality). *Asay* does just the opposite.

The cut-off date also violates the Fourteenth Amendment's guarantee of due process and equal protection of the law. Even defendants who are in the class of persons whose convictions and death sentences were final prior to *Hurst* and are seeking relief on collateral attack are treated differently without any regard for the facts and circumstances of their respective cases, with some defendants being granted postconviction relief from their death sentences and others not. A classification must be reasonable and not arbitrary, resting upon some ground of difference that has a fair and substantial relation to the object, so that all persons similarly circumstanced shall be treated alike. *Eisenstadt v. Baird,* 92 S. Ct. 438, 447 (1972). Persons sentenced to death also have a protected liberty interest in the sentencing procedures required by state law. *Evitts v. Lucey,* 105 S. Ct. 830 (1985).

If *Hurst* Applies Retroactively, Dillbeck Has a Meritorious Claim

But for this Court's non-retroactivity holding in *Asay,* Dillbeck has an otherwise valid claim that his death sentence is unconstitutional. Dillbeck

established one statutory and several non-statutory mitigating factors at trial (R. 128). Dillbeck's jury only made a unanimous finding as to the existence of one aggravating factor (contemporaneous felony) out of the five that were relied upon to impose the death penalty. In addition, the jury's recommendation of death was by a vote of only eight to four (R. 132). On these facts, *Hurst* error is present and is not harmless beyond a reasonable doubt because it is impossible to conclude that all twelve jurors made the required findings.

Additional Arguments to be Raised and Briefed in this Appeal

This response is limited to the Court's order to show cause why this appeal should not be dismissed in light of the decision in *Hitchcock*, and is not the equivalent of an appellate brief or a substitute therefor. Dillbeck wishes to preserve for federal court review all arguments for the retroactive application of *Hurst* to his case, including those issues addressed in *Hitchcock*.

Dillbeck wishes to preserve for federal court review his claim that *Hurst I* and *Hurst II* meet the federal test for retroactivity under *Linkletter v. Walker*, 85 S. Ct. 1731 (1965), and *Stovall v. Denno,* 87 S. Ct. 1967 (1967), which would require the state courts to apply *Hurst* retroactively under the Supremacy Clause as stated in *Montgomery,* 136 S. Ct. at 731-32. This argument was briefed and rejected in *Hitchcock,* and therefore is not presented here as a basis for discharging the show cause order. However, nothing in this response should be construed as a waiver of

Dillbeck's federal retroactivity argument or any other argument that this Court's retroactivity ruling in *Asay* is arbitrary and contrary to federal law. In addition, this Court's ruling in *Hitchcock* is pending certiorari review in the U.S. Supreme Court in Case No. 17-6180 and could be reversed.

Conclusion

Based on the foregoing, Dillbeck requests that the Court discharge the order to show cause based on *Hitchcock v. State,* and allow this appeal to proceed with full briefing and oral argument.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing response was furnished by electronic service to the Office of the Attorney General at capapp@myfloridalegal.com on October 13, 2017.

/s/ Baya Harrison
Baya Harrison, III