Storm of the Decade: The Aftermath of *Hurst v. Florida* & Why the Storm Is Likely to Continue

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The U.S. Supreme Court's decision in Hurst v. Florida *was a "hurricanic constitutional event" for capital sentencing, especially in Florida. After the storm made landfall—invalidating Florida's capital sentencing scheme based on the Sixth Amendment's guarantee of a trial by jury—the Supreme Court of Florida and Florida courts generally were left to pick up the debris and begin reconstruction. On remand from* Hurst v. Florida *and in other related cases, the Supreme Court of Florida addressed the immediate issues that* Hurst v. Florida *presented. Specifically, the Florida Supreme Court interpreted the U.S. Supreme Court's decision* Hurst v. Florida*, defined how* Hurst v. Florida *applied to Florida's capital sentencing, and determined that* Hurst *errors are capable of harmless error review. Then, in several related decisions, the Court addressed the retroactivity of the rights the Court defined in* Hurst *and defined the circumstances in which a* Hurst *error is, in fact, harmless beyond a reasonable doubt.*

However, as this Response to Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit *Caldwell*, *Clemons*, and *Profitt by Craig Trocino and Chance Meyer explains, the way in which the Supreme Court of Florida answered those questions in the immediate aftermath of* Hurst v.

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Florida *created and likely will create additional storms—storms that could be just as catastrophic as* Hurst v. Florida*. First, this Response assesses the aftermath of* Hurst v. Florida*, summarizing the framework the Supreme Court of Florida created in its wake. Then, this Response analyzes whether the Court heeded the warnings insightfully given in the Trocino and Meyer Article, specifically the importance of the Eighth Amendment in the Court's post-*Hurst *discussion. Ultimately, this Response argues that the Court did not, and that failure created turbulence that led to other storms, or issues, and will likely create additional storms in the future. This Response concludes by canvassing what storms may be looming on the horizon based on pending litigation and questions the Supreme Court of Florida left unanswered after* Hurst*.*

INTRODUCTION

The umbrellas have been put away, but the skies have not cleared after the "hurricanic constitutional event"[1] that precipitated after the U.S. Supreme Court's 2016 decision in *Hurst v. Florida* ("*Hurst v. Florida*").[2] In that decision, relying on the Sixth Amendment to the U.S. Constitution and the Supreme Court's 2002 decision in *Ring v. Arizona*,[3] *Hurst v. Florida* completely upended Florida's capital sentencing system at a time when Florida housed one of the nation's largest death rows—accounting for approximately 390 inmates awaiting execution.[4]

On remand, the Supreme Court of Florida's ("the Court's")[5] decision in *Hurst v. State* ("*Hurst*") broadened the discussion to include article I, section 22 of the Florida Constitution as well as the Eighth Amendment to the U.S. Constitution.[6] Through *Hurst* and other related decisions, the Supreme Court of Florida required, for death to remain a viable punishment in the State of Florida, the Florida Legislature to reevaluate Florida's capital sentencing scheme.[7] The Court also determined which of the State's 390 death row inmates would be eligible for *Hurst* relief and defined what that relief would be.[8]

Discussing *Hurst v. Florida* and its aftermath is important for capital defendants in Florida and for capital sentencing and the death penalty more broadly. This Response contributes to the discussion by providing one of the only explanations of the Court's *Hurst*-

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[1] Craig Trocino & Chance Meyer, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell*,* Clemons*, and* Profitt, 70 U. MIAMI L. REV. 1118, 1123 (2016).

[2] Hurst v. Florida, 136 S. Ct. 616 (2016).

[3] 536 U.S. 584 (2002).

[4] For more information on the demographics of Florida's death row at the time, see generally Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 U. MIAMI L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313018.

[5] For ease of discussion, the Supreme Court of Florida is referenced throughout this Response as "the Court," and the U.S. Supreme Court is referenced as "the Supreme Court."

[6] Hurst v. State, 202 So. 3d 40, 43, 55 (Fla. 2016) (per curiam), *cert. denied*, 137 S. Ct. 2161 (2017). *Hurst* is oftentimes also referred to as *Hurst II*.

[7] *Id*. at 62.

[8] *See infra* Section II.A.

related jurisprudence and plotting where we may be headed.[9] In their 2016 article, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell*,* Clemons*, and* Profitt ("the Trocino and Meyer Article"),[10] before *Hurst* was decided, Craig Trocino and Chance Meyer made eerily accurate predictions as to how the *Hurst v. Florida* storm would affect Florida's capital sentencing scheme. Writing from the aftermath, Part I of this Response to the Trocino and Meyer Article provides a report after the storm has largely passed. However, as Part II explains, capital sentencing in Florida has experienced significant climate change since *Hurst v. Florida*, which has caused some debates to resurface. And, the Court's decision in *Hurst* and other related decisions left several questions unanswered. As a result, this Response concludes with forecasts of future storms, specifically related to the vulnerability of the Court's decisions on the retroactivity of *Hurst* and the Court not fully addressing the Eighth Amendment implications of *Hurst*, as the Trocino and Meyer Article warned against.

I. REPORTING ON THE AFTERMATH

Assessing the aftermath of *Hurst v. Florida*, Section A first reviews the Court's decision on remand in *Hurst* and other related decisions. Next, Section B discusses whether the Supreme Court properly heeded the Eighth Amendment warning in the Trocino and Meyer Article. Contending that the Supreme Court did not, Section B explains how the Supreme Court could have significantly reduced the post-*Hurst* litigation that occurred by properly addressing and fully discussing the Eighth Amendment issues at its first opportunity. Finally, Section C reviews how—after the dust settled—executions in Florida resumed, which raised additional concerns about capital defendants' constitutional rights in the post-*Hurst* era.

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[9] A WestLaw search indicates that only seven law review articles cite *Hurst* as of January 5, 2020, though several more are forthcoming on SSRN.

[10] Trocino & Meyer, *supra* note 1.

A. *Florida Supreme Court's Decision on Remand in Hurst and Its Progeny*

As the Trocino and Meyer Article states, the U.S. Supreme Court's decision in *Hurst v. Florida* was concise in its reasoning and bare in discussion.[11] The Supreme Court concluded that its 2002 decision in *Ring*,[12] in fact, applied to Florida's capital sentencing scheme, which violated defendants' fundamental right to trial by jury under the Sixth Amendment. However, the Supreme Court left several questions unanswered that the Court was required to grapple with on remand.[13] This Section explains how the Court resolved those questions, specifically (1) how to interpret *Hurst v. Florida* on remand in *Hurst*, (2) whether *Hurst* errors are capable of harmless error review, and (3) whether *Hurst* applied retroactively to defendants whose sentences of death were final before the Supreme Court's decision in *Hurst v. Florida*.[14]

1. *INTERPRETING* HURST V. FLORIDA *ON REMAND IN* HURST

Almost ten months after the Supreme Court decided *Hurst v. Florida*, the Court issued its decision in *Hurst*.[15] On remand from *Hurst*, the Court had essentially two options: (1) the narrow route, or (2) the comprehensive route. The narrow route would have led to a holding that *Hurst v. Florida* required a jury to find unanimously beyond a reasonable doubt *only* the existence of one aggravating factor.[16] Relying on language from the Supreme Court's 2000 decision in *Apprendi v. New Jersey*,[17] the State advocated for this approach, and the dissent in *Hurst* ultimately agreed.[18]

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[11] *Id.* at 1123–25.

[12] 536 U.S. 584 (2002).

[13] Trocino & Meyer, *supra* note 1, at 1128.

[14] In addition, in *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016) (per curiam), the Court held that *Hurst* did not apply to defendants who had waived their right to a penalty phase jury.

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

[16] *See id.* at 77 (Canady, J., dissenting).

[17] 530 U.S. 466 (2000).

[18] *Hurst*, 202 So. 3d at 77 (Canady, J., dissenting) (citing *Apprendi*, 530 U.S. at 494); Brief for the Appellee at 11, Hurst v. State, 202 So. 3d 40 (Fla. 2016) (No. SC12–1947).

But, a majority of the Court—Chief Justice Labarga and Justices Pariente, Quince, and Lewis—chose the comprehensive route. As to the meaning of *Hurst v. Florida*, the majority held that *Hurst v. Florida* required the jury to unanimously make *each* finding necessary to impose a sentence of death beyond a reasonable doubt.[19] Based on Florida's capital sentencing scheme, the Court explained that "these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances."[20] Further, the Court determined that, "for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous."[21] As Professor Hoeffel explained, this holding seemed to be "[t]he logical progression after *Hurst* [*v. Florida*]" because it took any guesswork out of whether a jury's post-*Hurst* recommendation for death satisfied the mandates of the Sixth Amendment.[22] If the jury fails to reach any finding unanimously, the trial court must sentence the defendant to life.[23]

In reaching this holding, the Court added two constitutional provisions to the discussion: (1) article I, section 22 of the Florida Constitution,[24] and (2) the Eighth Amendment to the U.S. Constitution.[25] First, the Court made very clear that, in addition to the Sixth Amendment—as interpreted by the Supreme Court in *Hurst v. Florida*—its decision in *Hurst* was also grounded in the parallel right to trial by jury provided for in article I, section 22 of the Florida Constitution.[26] Second, seemingly heeding the warning

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[19] *Hurst*, 202 So. 3d at 44; *see* Perry v. State, 210 So. 3d 630, 633 (Fla. 2016) (per curiam). *But see Rogers v. State*, 2019 WL 4197021 (Fla. 2019) (receding from *Perry*).

[20] *Hurst*, 202 So. 3d at 44.

[21] *Id.* Justice Perry concurred in part and dissented in part. *Id.* at 75–76 (Perry, J., concurring in part and dissenting in part). Justices Canady and Polston dissented. *Id.* at 77–83 (Canady, J., dissenting).

[22] Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 ARK. L. REV. 267, 286 (2017).

[23] *See generally Hurst*, 202 So. 3d 40.

[24] *Id.* at 59.

[25] *Id*. at 44.

[26] *Id.* at 55, 59 ("Based on the foregoing, we conclude that under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by

in the Trocino and Meyer Article, the Court explained that the Eighth Amendment further supported its conclusion that the twelve-member jury's final recommendation for death must be unanimous.[27]

The same day the Court decided *Hurst*, it also decided *Perry v. State*. In *Perry*, the Court held that the statute the Florida Legislature enacted after *Hurst v. Florida* but before *Hurst* was unconstitutional because it failed to require that the jury's final recommendation for death be unanimous.[28] Instead, the statute required that only ten of the twelve jurors recommend death.[29]

The chart below illustrates what is explained above—how *Hurst v. Florida* and *Hurst* caused a sea change in Florida's capital sentencing scheme.

Comparison of Florida's Capital Sentencing Scheme Before and After *Hurst*		
	Pre-*Hurst*[30]	**Post-*Hurst*[31]**
Aggravating Factors	No statutory formal jury finding requirement, but at least one aggravating factor had to be established beyond a reasonable doubt	The jury must unanimously determine whether each aggravating factor presented by the State has been proven beyond a reasonable doubt.[32]

jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed."). Of course, by adding this state law basis for its decision, the Court weakened the Supreme Court's ability to review or change *Hurst* on certiorari. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

[27] *Hurst*, 202 So. 3d at 63. The dissent strongly disagreed with the majority's inclusion of the Eighth Amendment discussion. *See id.* at 80 (Canady, J., dissenting).

[28] Perry v. State, 210 So. 3d 630, 637–38 (Fla. 2016) (per curiam).

[29] *Id.*

[30] *See* FLA. STAT. § 921.141 (2015).

[31] *See* FLA. STAT. § 921.141 (2018).

[32] FLA. STAT. § 921.141(2)(a) (2018).

	before the defendant may be sentenced to death, a finding the trial court could make.	The jury must unanimously determine that at least one aggravating factor was proven beyond a reasonable doubt before the defendant may be sentenced to death.[33]
Sufficiency of Aggravation	No statutory formal jury finding requirement.	The jury must unanimously determine that the aggravating factors (as determined above) are sufficient to impose a sentence of death.[34]
Weighing Aggravation Against Mitigation	No statutory formal jury finding requirement.	The jury must unanimously determine that the aggravation outweighs the mitigation.[35]* *The jury must not unanimously agree on whether each mitigating circumstance was proven, or the weight each should

[33] FLA. STAT. § 921.141(2)(b) (2018).
[34] FLA. STAT. § 921.141(2)(b)(2)(c) (2018).
[35] FLA. STAT. § 921.141(2)(b)(2)(b) (2018).

		be given in this analysis.[36]
Jury Recommendation	7-5.	12-0.[37]

As illustrated in the chart above, *Hurst v. Florida* was the impetus to a complete renovation of Florida's capital sentencing scheme.

2. HARMLESS ERROR REVIEW

In the final paragraph of *Hurst v. Florida*, the Supreme Court noted that it would not address "the State's assertion that any error was harmless."[38] The Supreme Court explained that it "normally leaves it to state courts to consider whether an error is harmless," and *Hurst v. Florida* presented "no reason to depart from that pattern."[39] Thus, the Supreme Court left it to the Court to determine whether harmless error review applied to *Hurst* errors.[40]

If an error is capable of harmless error review, there are situations in which a defendant may not be entitled to relief even if his or her sentence is affected by the error—because the error is considered harmless in those situations. "[M]ost constitutional errors can be harmless."[41] Only structural errors, or those that "infect the entire trial process"[42] and "necessarily render a trial fundamentally unfair"[43] are incapable of harmless error review.[44] Applying the Supreme Court's precedent, the Court determined *Hurst* errors are "capable of harmless error review."[45]

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[36] *See* FLA. STAT. § 921.141(2) (2018).
[37] FLA. STAT. § 921.141(2)(c) (2018).
[38] Hurst v. Florida, 136 S. Ct. 616, 624 (2016).
[39] *Id.*
[40] *See* Hurst v. State, 202 So. 3d 40, 66 (Fla. 2016) (per curiam), *cert. denied*, 137 S. Ct. 2161 (2017).
[41] Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)); *see also* Chapman v. California, 386 U.S. 18, 22 (1967).
[42] Brecht v. Abrahamson, 507 U.S. 619, 630 (1993).
[43] Rose v. Clark, 478 U.S. 570, 577 (1986).
[44] *Neder*, 527 U.S. at 8.
[45] *Hurst*, 202 So. 3d at 68.

The Court then proceeded to "conduct a harmless error analysis under Florida law."[46] Florida's harmless error standard, as explained in *State v. DiGuilio*, provides that the State, as the beneficiary of the error, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."[47]

Under this standard, the Court determined in *Hurst*, with little explanation, that the error was not harmless beyond a reasonable doubt.[48] Of course, this seemed almost necessary considering the Supreme Court's decision in *Hurst v. Florida* that Hurst's sentence did not meet constitutional muster under the Sixth Amendment.

A month later, in *Davis v. State*,[49] the Court clarified how this harmless error standard plays out in *Hurst*-related cases and defined what *is* harmless in the *Hurst* context. The Court explained that a *Hurst* error is harmless beyond a reasonable doubt when it is "clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances."[50]

So, as in Davis's case, the Court determined that a *Hurst* error is harmless beyond a reasonable doubt if the pre-*Hurst* jury unanimously recommended a sentence of death. The Court reasoned that the jury's unanimous recommendation allows the Court to assume that the jury also unanimously made all of the other requisite findings.[51] Even though the jury was not required to explicitly make each of the findings now required by *Hurst*, the jury instructions properly explained the analysis the jury should conduct before rendering its recommendation. Therefore, the Court reasoned, the jury's unanimous recommendation for death indicates the jury also unanimously made the other necessary findings in the sentencing process.[52]

The Court proceeded to apply this framework to numerous defendants who sought *Hurst* relief—granting relief to eligible

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46 *Id.*
47 State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).
48 *Hurst*, 202 So. 3d at 69.
49 Davis v. State, 207 So. 3d 142, 174 (Fla. 2016) (per curiam).
50 *Id.*
51 *Id.* at 174–75.
52 *Id*.

defendants whose pre-*Hurst* juries did not unanimously recommend death and denying relief to defendants whose pre-*Hurst* juries unanimously recommended a sentence of death.[53]

3. HURST RETROACTIVITY

Finally, the Court was tasked with determining whether *Hurst* applied retroactively to defendants whose sentences of death were final when the Supreme Court decided *Hurst v. Florida*. In two decisions issued the same day in December 2016, the Court determined that the answer was "kind of." In *Asay v. State*[54] and *Mosley v. State*,[55] the Court held that *Hurst* applied retroactively only to defendants whose sentences of death became final after the Supreme Court's 2002 decision in *Ring v. Arizona*, which was essentially the precursor to *Hurst v. Florida*.[56]

In *Mosley*, the Court analyzed the retroactivity of *Hurst* under two alternative theories: (1) fundamental fairness under the Court's 1993 decision in *James v. State*,[57] and (2) the retroactivity framework set forth in the Court's 1980 decision in *Witt v. State*.[58] Discussing *James*, the *Mosley* Court explained "that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the U.S. Supreme Court

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[53] *See, e.g.*, Truehill v. State, 211 So. 3d 930, 956 (Fla. 2017) (per curiam). Of course, as explained below, this analysis apples only to defendants whose sentences of death became final after June 24, 2002. For information on how this played out in numbers, see Kalmanson, *supra* note 4, at 37. Defendants and jurists have debated the soundness of this analysis, and litigation regarding the soundness of the Court's *Hurst* harmless error analysis remains pending. *See, e.g.*, Reynolds v. Florida, 139 S. Ct. 27, 32 n.2 (2018) (Sotomayor, J., dissenting); Petition for Writ of Certiorari at 15–16, 21, Anderson v. Florida, No. 18-1306 (U.S. Apr. 16, 2019).

[54] Asay v. State, 210 So. 3d 1, 22 (Fla. 2016) (per curiam).

[55] Mosley v. State, 209 So. 3d 1248, 1274 (Fla. 2016).

[56] *See* Hurst v. Florida, 136 S. Ct. 616, 621–22 (2016); Susan D. Rozelle, *Keep Tinkering: The Optimist and the Death Penalty*, 70 ARK. L. REV. 349, 351 (2017) ("In *Hurst v. Florida*, the U.S. Supreme Court finally got around to what was clear back in 2002 when it decided *Ring v. Arizona*."); Jeffrey Wermer, Comment, *The Jury Requirement in Death Sentencing After* Hurst v. Florida, 94 DEN. L. REV. 385, 385 (2017).

[57] 615 So. 2d 668 (Fla. 1993).

[58] 387 So. 2d 922 (Fla. 1980); *Mosley*, 209 So. 3d at 1274.

decides a case that changes our jurisprudence."[59] Under this theory, the Court determined, defendants who had raised a *Hurst*-related claim before the Supreme Court's decision in *Hurst v. Florida*—which essentially proved their claims meritorious—were entitled to retroactive application of *Hurst*.[60]

Under *Witt*, "a change in the law does not apply retroactively 'unless the change: (a) emanates from this Court or the U.S. Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.'"[61] In a *Witt* analysis, unlike the *James* analysis, preservation of the claim is immaterial.[62] Applying this framework, the Court held in *Mosley* that *Hurst* applied retroactively to defendants whose sentences became final after *Ring*.[63] In pertinent part, the Court explained: "We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the U.S. Supreme Court decided *Ring*. From *Hurst*, it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State."[64]

But, what about defendants whose sentences were final before *Ring*? In *Asay*, the Court determined that, under the same *Witt* framework applied in *Mosley*, *Hurst* does not apply retroactively to defendants whose sentences of death became final before *Ring*.[65] Essentially, the Court reasoned that the rights explained in *Hurst* were first conceived in *Ring* and, therefore, did not exist when defendants whose sentences became final before *Ring* were sentenced. Thus, those defendants, the Court concluded, are not entitled to the benefit of those rights.[66] The Court's retroactivity

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[59] *Mosley*, 209 So. 3d at 1274–75 (citing James v. State, 615 So. 2d 668, 669 (Fla. 1993)).

[60] *Id*.

[61] *Id.* at 1276 (quoting *Witt*, 387 So. 2d at 931).

[62] *Id*. at 1276 n.13.

[63] *Id*. at 1283.

[64] *Id.* at 1281.

[65] Asay v. State, 210 So. 3d 1, 22 (Fla. 2016) (per curiam); *see also* Recent Case, Asay v. State*, 210 So. 3d 1 (Fla. 2016) (per curiam)*, 130 HARV. L. REV. 2251, 2252–53 (2017) (reviewing the Court's decision in *Asay*). This case is sometimes referred to as *Asay V* because it was Asay's fifth capital appeal. *See, e.g.*, Asay v. State, 224 So. 3d 695, 699 (Fla. 2017) (per curiam).

[66] *See Asay*, 210 So. 3d at 19 n.18.

framework from *Mosley* and *Asay* essentially split Florida's death row in half as to the sentences to which *Hurst* applied.[67]

After the Court's decisions in *Hurst*, *Davis*, *Mosley*, and *Asay*, a capital defendant in Florida could receive *Hurst* relief *only* if both of the following were true: (1) his or her sentence became final after June 24, 2002, the date *Ring* was decided,[68] *and* (2) the jury's original pre-*Hurst* recommendation for death was not unanimous.[69]

However, the *Asay*/*Mosley* framework may not be the end of the *Hurst*-retroactivity saga in Florida state courts.[70] As explained below, the Court has signaled that the *Asay*/*Mosley* framework may be in troubled waters.

B. *Did the Court Fully Heed the Eighth Amendment Storm Warning in the Trocino and Meyer Article?*

The Trocino and Meyer Article's prediction that *Hurst v. Florida* would cause an Eighth Amendment disaster for capital punishment in Florida was precisely accurate.[71]

Separate and apart from the Sixth Amendment storm *Hurst v. Florida* created, the Eighth Amendment storm went undetected until Florida was entrenched in the aftermath of *Hurst v. Florida*. Although the Court discussed the Eighth Amendment in *Hurst* and defendants presented pertinent arguments in post-*Hurst* briefing to

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[67] *See* Kalmanson, *supra* note 4; Dara Kam, *Florida's Supreme Court Reconsiders Death Penalty Sentencing System*, WUSF (May 21, 2019), https://health.wusf.usf.edu/post/floridas-supreme-court-reconsiders-death-penalty-sentencing-system?fbclid=IwAR382xt7DOTt8Zb22nkoAtq5INyTu26Mn7fBEAFC-_crmuZM5ncdbbDfoBg#stream/0 [hereinafter Kam, *Florida's Supreme Court*].

[68] *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d at 1283.

[69] Davis v. State, 207 So. 3d 146, 174 (Fla. 2016) (per curiam).

[70] As to federal courts, in late 2019, the U.S. Circuit Court of Appeals for the Eleventh Circuit addressed the retroactivity of *Hurst v. Florida* in federal habeas proceedings, concluding that, under the federal standard for retroactivity from *Teague v. Lane*, 489 U.S. 288 (1989), *Hurst v. Florida* does not apply retroactively to *any* defendants. *Cf.* Angela J. Rollins & Billy H. Nolas, *The Retroactivity of* Hurst v. Florida*, 136 S. Ct. 616 (2016) to Death-Sentenced Prisoners on Collateral Review*, 41 S. ILL. U.L.J. 181, 182 (2017) (arguing, before *Knight*, that *Hurst* should be fully retroactive under the federal standard for retroactivity). *See generally* Knight v. Fla. Dep't of Corrs., 936 F.3d 1322 (11th Cir. 2019).

[71] Trocino & Meyer, *supra* note 1, at 1178.

the Court, analysis on this Eighth Amendment right—retroactivity, harmless error, etc.—lies buried in the rubble. The Court did not discuss the Eighth Amendment in other related decisions until late 2017—a year after *Hurst*—in *Hitchcock v. State*[72] and *Reynolds v. State*.[73] Of course, these decisions came well after the *Hurst*-framework was clearly set and had been applied in numerous cases.

In *Hitchcock*, the Court addressed the question *Asay* left unanswered: retroactivity of the Eighth Amendment right announced in *Hurst*.[74] In *Hitchcock*, the Court was presented with "Eighth Amendment and due process arguments" not presented in *Asay*.[75] Yet, the Court applied *Asay*—a decision addressing a Sixth Amendment issue and applying Sixth Amendment jurisprudence—to hold in *Hitchcoc*k that the Eighth Amendment right from *Hurst* also does not apply retroactively past *Ring*.[76] In other words, the Court "assume[d] without explanation" that *Asay* foreclosed the relief requested in *Hitchcock*.[77]

Had the Court heeded the warning in the Trocino and Meyer Article and *fully* addressed the Eighth Amendment right originally, Florida courts and defendants could have been spared the wave of *Hitchcock*-related litigation—as the Trocino and Meyer Article predicted.[78] In fact, by delaying the Eighth Amendment analysis until *Hitchcock*, the Court created a second wave of postconviction motions and appeals in which defendants, who had already been denied retroactivity of the Sixth Amendment right per *Asay*, sought *Hurst* relief under the Eighth Amendment, which was then denied per *Hitchcock*. Had the Court addressed retroactivity of both the Sixth and Eighth Amendments in *Asay*, its analysis would have likely been different and more sound, *and* each defendant could have addressed retroactivity of both rights in one motion and appeal rather than two. Quantitatively, this would have saved the Florida trial courts approximately 150 postconviction motions and, likewise, the Court approximately 150 resulting appeals.[79]

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72 226 So. 3d 216 (Fla. 2017) (per curiam).
73 251 So. 3d 811 (Fla. 2018) (per curiam).
74 *Hitchcock*, 226 So. 3d at 220 (Pariente, J., dissenting).
75 *Id*.
76 *Id.* at 217 (majority opinion).
77 *Id.* at 220 (Pariente, J., dissenting).
78 Trocino & Meyer, *supra* note 1, at 1132.
79 *See* Kalmanson, *supra* note 4.

Then, in *Reynolds*, the Court finally addressed how the Supreme Court's 1985 landmark decision in *Caldwell v. Mississippi*[80] plays into the *Hurst* discussion[81]—an issue that defendants had presented in briefs to the Court since *Hurst*.[82] As the Trocino and Meyer Article explained, *Caldwell* "recognized an Eighth Amendment violation where a jury's 'sense of responsibility for determining the appropriateness of death' is diminished by the State."[83] Thus, the issue was how to reconcile Florida's pre-*Hurst* jury instructions, which told the jury that its recommendation was merely advisory, with *Caldwell* and the Eighth Amendment—even if the Sixth Amendment right was harmless beyond a reasonable doubt.[84] In other words, as the Trocino and Meyer Article put it, the issue was "whether under the Eighth Amendment Florida juries were misinformed as to the requisite importance of their role in capital sentencing proceedings."[85] How could a unanimous jury recommendation from a pre-*Hurst* jury, instructed that its recommendation was merely advisory, clear the constitutional hurdle of *Caldwell*?

Applying the Supreme Court's decision in *Romano v. Oklahoma*,[86] the Court concluded that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time [they were given] under Florida law."[87] Again, defendants were without recourse under the Eighth Amendment.

Although the Court attempted to address the *Caldwell* concern in *Reynolds*, Trocino and Meyer would likely contend the analysis was incomplete.[88] Indeed, Justice Sotomayor—joined by others—several times expressed dissatisfaction with how the Court

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80 472 U.S. 320 (1985).

81 Reynolds v. State, 251 So. 3d 811, 823–25 (Fla. 2018).

82 Reply Brief for Petitioner at 15–16, Hurst v. State, 202 So. 3d 40 (Fla. 2016) (No. 14-7505).

83 Trocino & Meyer, *supra* note 1, at 1128 (quoting *Caldwell*, 472 U.S. at 341).

84 *Reynolds*, 251 So. 3d at 818.

85 Trocino & Meyer, *supra* note 1, at 1129, 1139.

86 512 U.S. 1 (1994).

87 *Reynolds*, 251 So. 3d at 825.

88 *See* Trocino & Meyer, *supra* note 1, at 1155-56.

attempted to reconcile *Hurst v. Florida* and *Caldwell*.[89] Dissenting from the Supreme Court's denial of certiorari in *Reynolds*, Justice Sotomayor wrote that, although the Court "addressed the *Caldwell* issue at length," the plurality's analysis was lacking for two reasons:[90] (1) the Court's harmless error analysis ignores the *Caldwell* error in pre-*Hurst* jury recommendations for death and, therefore, begs an Eighth Amendment question,[91] and (2) the Court's *Romano* analysis may not be dispositive.[92] Justice Sotomayor explained that the issue is deeper than the Court acknowledged—that *Caldwell* should have more consideration in the Court's *Hurst* harmless error analysis. Justice Breyer has expressed his agreement with Justice Sotomayor.[93]

In addition to the issues Justice Sotomayor raises, the Trocino and Meyer Article raised concerns that were not covered in the Court's Eighth Amendment harmless error analysis. For example, can the Court "achieve the level of reason and soundness required of a *Clemons* harmless error analysis while only specula[ting]," as it did in *Davis*, about the jury's findings before it recommended death?[94] While the Court attempted in *Hitchcock* and *Reynolds* to fill the gaps in its analysis of the Eighth Amendment—after it added the Eighth Amendment to the discussion in *Hurst*—the Court seems to have missed the boat in fully reconciling its post-*Hurst* framework and the Eighth Amendment, as the Trocino and Meyer Article suggested.

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[89] *See, e.g.*, Middleton v. Florida, 138 S. Ct. 829, 829 (2018) (Sotomayor, J., dissenting) (mem.) ("Yet again, the Florida Supreme Court has failed to address an important Eighth Amendment claim raised by capital defendants regarding the propriety of jury instructions that repeatedly emphasized that the jurors' role in sentencing the defendants to death was merely advisory.").

[90] *See* Reynolds v. Florida, 139 S. Ct. 27, 34–35 (2018) (Sotomayor, J., dissenting).

[91] *Id.* at 35 ("To the extent the Florida Supreme Court gives dispositive weight to the fact that an advisory jury offered a unanimous recommendation, that action implicates the Eighth Amendment concerns that *Caldwell* addressed.").

[92] *Id*.

[93] *See, e.g.*, *id.* at 29 (statement of Breyer, J., respecting the denial of certiorari).

[94] Trocino & Meyer, *supra* note 1, at 1156.

C. *Executions Resume in Florida*

Once it was clear that a group of defendants—namely, those whose sentences of death became final before *Ring*—would not be entitled to *Hurst* relief, Florida's then-Governor Rick Scott resumed executions. On July 3, 2017, Governor Scott signed the first post-*Hurst* death warrant, scheduling Mark Asay's execution for August 24, 2017.[95] As discussed above, Asay's case was the lead case for denying *Hurst* retroactivity to pre-*Ring* defendants; his sentence became final in 1991.[96]

Asay's warrant brought light to another issue in Florida's capital sentencing scheme: the lethal injection protocol.[97] While the rest of Florida was weathering the *Hurst* storm, the Florida Department of Corrections amended its lethal injection protocol.[98] Adopted on January 4, 2017, the new protocol replaced midazolam with etomidate for the first drug in the three-drug process.[99] In a postconviction claim filed after Governor Scott signed his death warrant, Asay argued that "the State's adoption of etomidate as the first drug in the lethal injection protocol place[d] him at substantial risk of serious harm in violation of the Eighth Amendment."[100]

After an evidentiary hearing, the trial court denied Asay's claim.[101] On appeal, despite a strong dissenting opinion by Justice Pariente, the Court determined Asay had not demonstrated a substantial risk of serious harm and, therefore, affirmed the denial.[102] After all of his post-warrant claims were denied,[103] Asay

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[95] Asay v. State, 224 So. 3d 695, 699 (Fla. 2017) (per curiam).

[96] Asay v. State, 210 So. 3d 1, 8 (Fla. 2016) (per curiam).

[97] *Asay*, 224 So. 3d at 701.

[98] Dara Kam, *Florida Changes Lethal Injection Drugs*, DAYTONA BEACH NEWS J. (Jan. 5, 2017, 5:04 PM), http://www.news-journalonline.com/news/20170105/florida-changes-lethal-injection-drugs.

[99] *Asay*, 224 So. 3d at 705 (Pariente, J., dissenting).

[100] *Id.* at 700 (majority opinion). Evidence suggested that etomidate caused "transient venous pain on injection and transient skeletal movements, including myoclonus." *Id.* at 701 (quoting the package insert for the drug etomidate).

[101] *Id.* at 700–01.

[102] *Id.* at 701.

[103] *See generally* Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, U. PA. J. L. & PUB. AFFAIRS (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398409 [hereinafter

was executed on August 24, 2017—almost a year after the Court's decision in *Hurst*—using Florida's new lethal injection protocol.[104]

Asay's was Florida's first execution in over eighteen months.[105] Since then, Florida has executed six additional defendants: (1) Michael Lambrix on October 5, 2017, (2) Patrick Hannon on November 8, 2017, (3) Eric Branch on February 22, 2018, (4) Jose Jimenez on December 13, 2018, (5) Bobby Long on May 23, 2019, and (6) Gary Bowles on August 22, 2019.[106] The next scheduled execution was stayed by a federal court until December 30, 2019, and has not yet been rescheduled.[107]

II. NEW STORMS ON THE HORIZON

Although capital sentencing and executions have resumed in Florida, the waters have not calmed completely. This Part explains new storms looming on the horizon. First, Section A explains how the climate has changed in significant ways since *Hurst v. Florida*. On the heels of that change, Section B explains how the Court has started to retrace some of its post-*Hurst* footsteps and walk back some of its decisions. Likewise, Section C explains the vulnerability of the Court's retroactivity decisions in *Asay* and *Mosley*. Finally, following up to the discussion above, Section D reviews whether an Eighth Amendment storm is imminent.[108]

Kalmanson, *Death Row*] (discussing issues in the litigation of post-warrant claims).

[104] Faith Karimi, *Florida Death Row Inmate Executed with New Drug*, CNN, https://www.cnn.com/2017/08/24/health/florida-death-row-inmate-execution/index.html (last updated Aug. 25, 2017).

[105] *Id*.

[106] *Execution List: 1976-Present*, FLA. DEP'T OF CORRECTIONS., http://www.dc.state.fl.us/ci/execlist.html (last visited Jan. 12, 2020). Bobby Long was the first execution scheduled by Florida's new Governor, Ron DeSantis. *See infra* Section II.A.2.

[107] FLA. SUP. CT, *Pending Death Warrant Filings*, https://www.floridasupremecourt.org/News-Media/Death-Warrant-Cases (last visited Dec. 1, 2019).

[108] In the interest of brevity for this Response, this Part does not analyze all of the potential issues that could arise or their outcomes. Rather, this Response seeks to survey the landscape as it is after *Hurst* to provide a Response to the Trocino and Meyer Article. For more on how some of the issues discussed herein, and the viability of capital sentencing more broadly, may play out, see Melanie Kalmanson, *Steps Toward Abolishing the Death Penalty: Incrementalism in the*

A. *Climate Change*

With climate change comes the increased likelihood of intense storms.[109] Since *Hurst v. Florida*, major players affecting capital sentencing, specifically in Florida, have experienced significant climate change, namely (1) the U.S. Supreme Court, (2) Florida's Governor, and (3) the Supreme Court of Florida.

1. U.S. SUPREME COURT

When it decided *Hurst v. Florida*, the Supreme Court consisted of Chief Justice Roberts and Justices Sotomayor, Scalia, Kennedy, Thomas, Ginsburg, Kagan, Breyer, and Alito.[110] Almost exactly one month after *Hurst v. Florida*, though, Justice Antonin Scalia unexpectedly passed away.[111] He was replaced by Justice Neil Gorsuch.[112] Then, in the summer of 2018, Justice Kennedy, who was notorious for being the Supreme Court's swing vote on

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Death Penalty in the United States, 28 WM. & MARY BILL OF RTS J. (forthcoming 2020); Kalmanson, *Death Row*, *supra* note 103.

[109] *See How Can Climate Change Affect Natural Disasters?*, USGS, https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters-1?qt-news_science_products=0 - qt-news_science_products (last visited Jan. 5, 2020).

[110] Hurst v. Florida, 136 S. Ct. 616, 618 (2016).

[111] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

[112] Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html.

controversial issues,[113] retired.[114] He was replaced by Justice Kavanaugh.[115]

The changes to the Supreme Court since *Hurst v. Florida* caused significant changes to its dynamics.[116] Recent decisions suggest this "new" Supreme Court has a lot to say about the death penalty and, specifically, the Eighth Amendment.[117] For example, in *Bucklew v. Precythe*, the Supreme Court addressed Bucklew's as-applied challenge to the State of Missouri's lethal injection protocol, which he argued would cause him substantial pain due to "his unusual medical condition."[118]

Because of his medical condition, Bucklew contended that the use of the lethal injection protocol in his execution would cause a horrific and undoubtedly unconstitutional scene.[119] Specifically, Bucklew explained that he "suffers from a disease called cavernous hemangioma, which causes vascular tumors—clumps of blood vessels—to grow in his head, neck, and throat."[120] Because of this, his complaint alleged, the pentobarbital may not "circulat[e]

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[113] *E.g.*, DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH xii (2018).

[114] *See* Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html; *see also* Chris Cillizza, *Anthony Kennedy's Retirement Just Confirmed Every Republican's Dream Scenario for Trump*, CNN (June 27, 2018), https://www.cnn.com/2018/06/27/politics/kennedy-retirement-donald-trump/index.html.

[115] Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

[116] *See* Adam Liptak and Alicia Parlapiano, *A Supreme Court Term Marked by Shifting Alliances and Surprising Votes*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html.

[117] *See, e.g.*, Nina Totenberg, *Supreme Court's Conservatives Defend Their Handling of Death Penalty Cases*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases; *see also United States Supreme Court Decisions: 2018-2019 Term*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/united-states-supreme-court-decisions-2018-2019-term. (last updated Apr. 18, 2019).

[118] Bucklew v. Precyth, 139 S. Ct. 1112, 1118 (2019).

[119] *See id.* at 1120.

[120] *Id.*

properly in his body; . . . the use of a chemical dye to flush the intravenous line could cause his blood pressure to spike and his tumors to rupture; and [the] pentobarbital could interact adversely with his other medications."[121] On appeal, he explained that he "would be unable to prevent his tumors from obstructing his breathing, which would make him feel like he was suffocating" during the execution.[122]

In a majority written by Justice Gorsuch, the Supreme Court returned to the history and language of the Eighth Amendment in reiterating the constitutionality of capital punishment.[123] Denying relief to Bucklew, the majority bluntly reaffirmed that "the Eighth Amendment does not guarantee a prisoner a painless death."[124]

In many ways, *Bucklew* seems to signal a change in the tide for Supreme Court death penalty jurisprudence. Where the pre-*Hurst v. Florida* Supreme Court seemed reluctant to squarely face issues pertaining to the constitutionality of the death penalty and, instead, focused on related procedural issues,[125] the new Supreme Court does not seem to have the same aversion. Also, where the pre-*Hurst v. Florida* Supreme Court seemed to seek the narrower route to addressing constitutional challenges, the new Supreme Court does not seem afraid to make broad pronouncements, as in *Bucklew*.[126]

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121 *Id.*

122 *Id.* at 1122.

123 *Id.* at 1122–24.

124 *Id.* at 1124. Two days after *Bucklew*, against a strong dissent by Justice Breyer—joined by Justices Ginsburg, Sotomayor, and Kagan—the Court lifted a stay of execution in Christopher Lee Price's case, in which Price raised a similar claim. Dunn v. Price, 139 S. Ct. 1312, 1312, 1313–15 (2019) (Breyer, J., dissenting).

125 *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015) (holding that to prevail on a challenge to a method of execution, the petitioner must show that the proposed method entails a "substantial risk of serious harm" or an "objectively intolerable risk of harm"); Hall v. Florida, 572 U.S. 701, 704 (2014) (reliance on IQ scores alone to determine mental competency of condemned prisoners "creates an unacceptable risk that persons with intellectual disability will be executed"); Leal Garcia v. Texas, 564 U.S. 940, 941 (2011) (per curiam) (denying stay of execution and petition for certiorari and further stating that "we are doubtful that it I ever appropriate to stay a lower court judgment in light of unenacted legislation.").

126 *Bucklew*, 139 S. Ct. at 1124 (holding "the Eighth Amendment does not guarantee a prisoner a painless death").

Thus, the change in the Supreme Court since *Hurst v. Florida* could affect capital sentencing in Florida and beyond in the near future.

2. GOVERNOR OF FLORIDA

In November 2018, Florida welcomed a new Governor after a contested election.[127] Republican Governor DeSantis replaced Republican Governor Scott.[128]

One reason the election of Florida's new Governor matters in this context is that the election had high stakes at the state's highest court. Simultaneous with the change in Florida's Governor, the Supreme Court of Florida would also undergo a transformation,[129] as the Florida Constitution required three of the Court's justices to retire in January 2019.[130] As a result, the Governor elected in the November 2018 election would have the opportunity to, in one fell swoop, select three Justices to serve on the State's highest court.[131] Indeed, as explained below, Governor DeSantis would hand-pick three of the seven justices on Florida's highest court.

3. SUPREME COURT OF FLORIDA

Of the seven justices who were on the Court when *Hurst* was decided in October 2016[132]—then-Chief Justice Jorge Labarga,[133]

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[127] Anthony Man, *Ron DeSantis Elected Florida Governor in Close Race, Giving Victory to Donald Trump*, SUN-SENTINEL (Nov. 7, 2018), https://www.sun-sentinel.com/news/politics/fl-ne-election-florida-governor-desantis-gillum-20181105-story.html.

[128] *Id*.

[129] Gray Rohrer, *Florida Supreme Court: Next Governor Gets to Replace Retiring Justices*, ORLANDO SENTINEL (Oct. 16, 2018), https://www.orlandosentinel.com/politics/os-ne-scott-appoint-justices-20181015-story.html.

[130] FLA. CONST. art. V, § 8; Rohrer, *supra* note 129.

[131] *Id.* This came after heated litigation at the Court about whether the incumbent or newly elected Governor would get to make the appointments. *See* League of Women Voters of Fla. v. Scott, 257 So. 3d 900, 900 (Fla. 2018); League of Women Voters of Fla. v. Scott, 232 So. 3d 264, 264–65 (Fla. 2017) (per curiam).

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

[133] *Justice Jorge Labarga*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Justice-Jorge-Labarga (last visited Dec. 28, 2019).

now-Chief Justice Charles Canady,[134] and Justices R. Fred Lewis,[135] Barbara Pariente,[136] James Perry,[137] Ricky Polston,[138] and Peggy Quince[139]—only three remain.[140] Only one Justice who joined the majority decision in *Hurst*, then-Chief Justice Labarga, still sits on the Court.[141]

The other two justices remaining from the Court that decided *Hurst*, now-Chief Justice Canady and Justice Polston,[142] dissented, arguing that the majority's view was unnecessarily broad and overarching; as mentioned above, they preferred the narrow route in interpreting *Hurst v. Florida*—that the Sixth Amendment "simply requires" that the jury find that the State has proven *one* aggravating factor beyond a reasonable doubt.[143] Chief Justice Canady also dissented from the Court's decision in *Mosley*.[144]

The other current justices—Justices Alan Lawson and Carlos Muñiz—have joined the Court since *Hurst*. Justice Lawson was

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[134] *Chief Justice Charles T. Canady*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Chief-Justice-Charles-T.-Canady (last visited Dec. 28, 2019).

[135] *Justice R. Fred Lewis*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-R.-Fred-Lewis (last visited Dec. 28, 2019).

[136] *Justice Barbara J. Pariente*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Barbara-J.-Pariente (last visited Dec. 28, 2019).

[137] *Justice James E.C. Perry*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-James-E.C.-Perry (last visited Dec. 28, 2019).

[138] *Justice Ricky Polston*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Justice-Ricky-Polston (last visited Dec. 28, 2019).

[139] *Justice Peggy A. Quince*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Peggy-A.-Quince (last visited Dec. 28, 2019).

[140] *See Florida Supreme Court Justices*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices (last visited Dec. 28, 2019) (listing Chief Justice Canady and Justices Poston and Labarga as current members of the Court).

[141] *See id.*

[142] *See id.*

[143] Hurst v. State, 202 So. 3d 40, 77 (Fla. 2016) (Canady, J., dissenting) (per curiam), *cert. denied*, 137 S. Ct. 2161 (2017).

[144] Mosley v. State, 209 So. 3d 1248, 1285 (Fla. 2016) (Canady, J., concurring in part and dissenting in part) (per curiam).

sworn in on April 5, 2017, following Justice Perry's retirement.[145] Soon after joining the Supreme Court, Justice Lawson expressed his views on *Hurst* and, in doing so, aligned himself with the views of Chief Justice Canady and Justice Polston in their dissenting opinion in *Hurst*.[146] Then, in January 2019, Governor DeSantis replaced retiring Justices Pariente, Quince, and Lewis with Justices Lagoa, Luck, and Muñiz.[147] Justices Lagoa and Luck have since been appointed to the Eleventh Circuit, leaving two vacancies for Governor DeSantis to fill.[148]

After these changes to the Court, it is likely that the dissent's view in *Hurst* could garner a majority to overturn the old Court's decision in *Hurst*. Indeed, the new Court has already shown a willingness to overturn or change decisions made under the old Court.[149] As to *Hurst*, the new Court has already indicated that the Court's *Hurst* precedent (set under the old Court) is not safe.[150] As Section B explains below, the Court's decision in *Rogers* took full advantage of an opportunity to amend the old Court's interpretation of *Hurst v. Florida*, specifically the burden of proof that applies to each of the necessary findings in the sentencing process. Similarly, as Section C explains, the new Court created waves around the old Court's retroactivity decisions by explicitly asking the parties in

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[145] *Justice Alan Lawson*, FLA. SUPREME CT., https://www.floridasupremecourt.org/Justices/Justice-Alan-Lawson (last visited Jan. 12, 2020).

[146] Okafor v. State, 225 So. 3d 768, 775–76 (Fla. 2017) (Lawson, J., concurring specially) (per curiam).

[147] *See, e.g.*, John Kennedy, *DeSantis Appoints Third Florida Supreme Court Justice, Completing Conservative Makeover*, HERALD-TRIBUNE (Jan. 22, 2019), https://www.heraldtribune.com/news/20190122/desantis-appoints-third-florida-supreme-court-justice-completing-conservative-makeover. The "old Court" refers to the Court when Justices Pariente, Quince, and Lewis were on the Court. The "new Court" refers to the Court after they were replaced by Justices Lagoa, Muñiz, and Luck.

[148] *Florida Supreme Court Justices*, *supra* note 140.

[149] *See* Raychel Lean, *'Daubert' Evidence Standard Takes Immediate Effect in Florida After High Court Turnaround*, DAILY BUSINESS REV. (May 23, 2019), https://www.law.com/dailybusinessreview/2019/05/23/daubert-evidence-standard-takes-immediate-effect-in-florida-after-high-court-turnaround/?slreturn=20190424095900; *see also* Kam, *Florida's Supreme Court*, *supra* note 67. *Compare* Orange Cty. v. Singh, 2019 WL 98251 (Fla. Jan. 4, 2019), *with* Orange County v. Singh, 268 So. 3d 668, 675 (Fla. 2019).

[150] *See infra* Section II.B.

Owen v. State to brief the Court on the validity of the old Court's decisions *Asay* and *Mosley*.[151] Thus, it remains to be seen what the new Court means for *Hurst* and its progeny and, more generally, capital sentencing in Florida.

B. *Redefining the "Elements," Changing the Burden of Proof from* Hurst *and* Perry

One aspect of the old Court's jurisprudence that the new Court has already amended is defining what constitutes an element in the capital sentencing process—i.e., what findings must be proven beyond a reasonable doubt. At oral argument in June 2019 in *Doty v. State*,[152] justices suggested their disagreement with the Court's majority opinion in *Hurst*.[153] Specifically, Justices Luck and Lawson seemed to suggest their agreement with now-Chief Justice Canady's dissenting argument in *Hurst* that the only *element* the jury must find beyond a reasonable doubt is the existence of one aggravating factor.[154]

Justice Luck indicated that, under his reading of *Hurst*, the decision does not require anything other than the existence of one aggravating factor beyond a reasonable doubt.[155] The other findings the Court determined were necessary before the defendant may be sentenced to death—whether the aggravating factors are sufficient and whether the aggravating factors outweigh the mitigation—need not be found beyond a reasonable doubt.[156] Defense counsel disagreed, explaining that *Hurst*, following the Supreme Court's opinions in *Apprendi* and *Ring*, implemented a "beyond a reasonable doubt" standard for each of the findings that increase the maximum penalty.[157]

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[151] *See* Order, Owen v. State, No. SC18-810 (Fla. Apr. 24, 2019) [hereinafter April 24 Order].

[152] 170 So. 3d 731 (Fla. 2019).

[153] Florida Supreme Court, *SC18-973 Wayne C. Doty v. State of Florida*, YOUTUBE (June 12, 2019), https://www.youtube.com/watch?v=oM1uoUYcSlk#action=share [hereinafter *Doty* OA Video].

[154] *Id.*

[155] *Id.* at 3:25–4:10.

[156] *Id.*; *see* Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) (per curiam), *cert. denied*, 137 S. Ct. 2161 (2017).

[157] *Doty* OA Video, *supra* note 153, at 3:25–4:10.

Justice Luck then juxtaposed aggravating factor findings with mercy and suggested that applying the "beyond a reasonable doubt" standard to the former would require applying it to the latter, which he suggested is impossible.[158] He questioned how the weighing process between aggravation and mitigation is "susceptible to beyond a reasonable doubt."[159] Defense counsel explained that these considerations are distinguishable.[160]

Similarly, Justice Lawson questioned why the jury must not find each mitigating circumstance beyond a reasonable doubt if the standard applies to the other findings in the sentencing process.[161] Defense counsel explained that mitigation does not raise the maximum penalty, whereas the other findings do. Therefore, counsel argued that the Sixth Amendment requires that they be proven beyond a reasonable doubt.[162]

Later, Justice Luck questioned how the Court's decision in *Perry v. State*[163] can withstand the Court's later decision in *Foster v. State*.[164] As explained above, the Court held in *Perry* that the statute enacted by the Florida Legislature between *Hurst v. Florida* and *Hurst* was unconstitutional for failing to require a jury's unanimous recommendation for death.[165] However, the Court held that the other provisions of the statute could be construed constitutionally under *Hurst* by requiring that they be made unanimously by the jury.[166]

In *Foster*, the Court addressed the *Hurst*-related issue of whether "a defendant who is convicted of first-degree murder has a substantive right to a life sentence unless a unanimous jury finds beyond a reasonable doubt all of the elements of 'capital first-degree

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158 *Id.* at 4:10–5:00.

159 *Id.* at 5:05–5:15.

160 *Id.* at 5:05–5:30.

161 *Id.* at 5:30–6:14.

162 *Id.* at 5:30–6:55.

163 210 So. 3d 630 (Fla. 2016) (per curiam).

164 Foster v. State, 258 So. 3d 1248 (Fla. 2018) (per curiam); *Doty* OA Video, *supra* note 153, at 6:55–7:15.

165 *Perry*, 210 So. 3d at 630, 635.

166 *Id.* at 639 (emphasis added) (citations omitted). In *Perry*, the Court found that the statute was not severable and, therefore, invalidated. *Id.* at 640. However, in *Evans v. State*, 213 So. 3d 856 (Fla. 2017) (per curiam), the Court determined that the statute was severable and could be applied to pending prosecutions so long as the jury instructions required a jury's unanimous recommendation for death. *See id.* at 859.

murder.'"[167] In raising this issue, Foster defined the elements of "capital first-degree murder" as "murder plus the . . . elements the jury is required to find unanimously under" Florida's post-*Hurst* capital sentencing scheme.[168] Foster, a pre-2002 defendant not entitled to *Hurst* retroactivity under *Asay*, argued that his conviction was infirm based on the jury's failure to make the *Hurst*-required findings in an attempt to overturn his sentence of death.[169]

In reviewing this claim, the Court first held that Foster's due process argument failed. The Court explained the difference between a jury's guilt-related and penalty-related findings.[170] The jury must not make all of the findings necessary to impose death for a defendant to stand convicted of first-degree murder.[171] In other words, a conviction of first-degree murder is based on findings different from the findings a jury must make to impose a sentence of death. Next, the Court held, without analysis, that Foster's Eighth Amendment claim—"that the failure to convict him of every element of 'capital first-degree murder' violates the Eighth Amendment"—failed for reasons explained in *Hitchcock*.[172]

Despite Justice Luck's suggestion at oral argument that *Foster* and *Perry* are irreconcilable, one could argue they are wholly distinguishable. Where *Perry* addressed the new statute enacted by the legislature after *Hurst* and whether that statute could be applied to pending prosecutions, Foster raised this issue as an attempt to get around the Court's retroactivity decisions in *Asay* and *Hitchcock*, which precluded him from *Hurst* relief.[173] *Perry* applied the Court's holding in *Hurst* regarding penalty phase findings, whereas *Foster* distinguished between a conviction of first-degree murder (guilt) and *Hurst* findings. *Perry* applied the Court's holding in *Hurst*, which was largely based on the right to trial by jury; whereas the analysis in *Foster* was based in due process.

Nevertheless, in *Rogers v. State*, the new Court receded from the old Court's decision in *Perry* and relied on *Foster* to conclude that a jury need not make all of the *Hurst* findings beyond a reasonable

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167 *Foster*, 258 So. 3d at 1251.
168 *Id.*
169 *Id.* at 1252.
170 *Id.*
171 *Id.*
172 *Id.* at 1252–53.
173 *See id.* at 1250.

doubt.[174] This change, of course, confuses the capital jury instructions and significantly reduces defendants' rights as the old Court defined them in *Hurst* and *Perry*.

C. *Rescinding Retroactivity*

The new Court has also indicated that the old Court's retroactivity analysis from *Asay*/*Mosley* is in troubled waters.[175] In *Owen v. State*, after the old Court had set limited briefing on whether Owen's case should be denied per the standing *Hurst* framework,[176] the new Court *sua sponte* issued an order directing the parties to brief whether the Court should recede from *Asay* and *Mosley*.[177]

On its face, receding from *Asay* and *Mosley*'s determinations of *Hurst* retroactivity could mean two things: (1) denying retroactivity completely, or (2) granting full retroactivity. However, in an order dated May 10, 2019, in *Long v. State*, the Court indicated that its intention in reviewing retroactivity in *Owen* is likely to accomplish only the former.[178] The Court appears to be reconsidering whether *Hurst* should apply retroactively to *any* defendants.[179]

The State seemingly welcomed the invitation from the Court to undermine *Asay* and *Mosley*. In its answer brief, Florida's Attorney General argued, among other things, that *stare decisis* does not preclude the Court from overruling *Asay* and *Mosley* because they are premised on "a complete alteration" of Florida's retroactivity case law.[180]

There is no doubt that a black cloud named *Owen* hangs over Florida's death row. If the Court decides to recede from *Asay* and *Mosley* and hold that *Hurst* should not even apply retroactively to post-*Ring* defendants, Florida is in for another storm. What happens to defendants who have been resentenced after receiving *Hurst* relief? Many of them who have completed their resentencing

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174 Rogers v. State, 2019 WL 4197021, at *7 (Fla. Sept. 5, 2019).

175 *See* April 24 Order, *supra* note 151.

176 Order, Owen v. State, No. SC18-810 (Fla. June 25, 2018).

177 April 24 Order, *supra* note 151.

178 *See* Order, Long v. State, No. SC19-726 (Fla. May 10, 2019).

179 *See id*.

180 Brief of Appellee at 4–9, 21, 40, Owen v. State, No. SC18-810 (Fla. June 3, 2019). The Florida Prosecuting Attorneys Association was granted permission to appear as Amicus Curiae in support of the State. Order, Owen v. State, No. SC18-810 (Fla. June 11, 2019).

proceedings have received life sentences, but many are still awaiting resentencing.[181] Do they have claims of constitutional violations based on the rescission of *Hurst* retroactivity? Relatedly, if the Court rescinds *Asay* and *Mosley*—which were based on the Sixth Amendment right in *Hurst v. Florida* and Sixth Amendment jurisprudence—what happens to the retroactivity of the Eighth Amendment right, the analysis for which the Court determined in *Hitchcock*, relying on *Asay*? At that point, *Hitchcock* and the Eighth Amendment would be capital defendants' only hope.

Although it is unlikely that the Court would recognize the distinction between the Sixth and Eighth Amendments and uphold the retroactivity of the Eighth Amendment right in *Hurst*, at least to *Ring*, it would be important for defendants to seek clarification as to the proper distinction between the Sixth and Eighth Amendments, especially in capital sentencing. Perhaps then the Court could review and correct *Hitchcock*, which conflated the Sixth and Eighth Amendments by relying on Sixth Amendment precedent to deny an Eighth Amendment right.[182] Or, also unlikely, the U.S. Supreme Court could step in.[183] Absent review, we are left with an incomplete and confused Eighth Amendment analysis—as Trocino and Meyer predicted.[184]

D. *Has Florida Avoided the Eight Amendment Storm?*

Trocino and Meyer warned: "Like the *Hurst* of the Sixth seems to have sunk the entire ship, tomorrow's *Hurst* of the Eighth might

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[181] *E.g.*, Order Vacating Death Sentence at 1–3, Barnhill v. State, No. 95-2932-CFA (Fla. Feb. 20, 2017); *see Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring (last updated Sept. 25, 2019).

[182] Hitchcock v. State, 226 So. 3d 216, 217 (Fla. 2017) (per curiam).

[183] Crain v. Florida, 139 S. Ct. 947 (2019) (denying cert.); Franklin v. Florida, 139 S. Ct. 479 (2018) (denying cert.); Hall v. Florida, 139 S. Ct. 1179 (2019) (denying cert.); Guardado v. Florida, 139 S. Ct. 477 (2018) (denying cert.); Grim v. Florida, 139 S. Ct. 480 (2018) (denying cert.); Johnston v. Florida, 139 S. Ct. 481 (2018) (denying cert.); Philmore v. Florida, 139 S. Ct. 478 (2018) (denying cert.); Reynolds v. Florida, 139 S. Ct. 27, 32–36 (2018) (denying cert.); Tanzi v. Florida, 139 S. Ct. 478 (2018) (denying cert.); Hitchcock v. Florida, 138 S. Ct. 513 (2017) (denying cert.).

[184] Trocino & Meyer, *supra* note 1, at 1129.

do the same."[185] In theory, this is correct. And the Court's incomplete and tangled review of the Eighth Amendment suggests the same.[186]

However, as mentioned above, neither the Court nor the Supreme Court seem inclined to address and clarify the Eighth Amendment mess that *Hurst* and its progeny caused. The Supreme Court has consistently—even despite strong dissents—denied certiorari on each case matriculating from the Florida Supreme Court after *Hurst*, including those that created rough waters for the Eighth Amendment, such as *Hitchcock*.[187]

Perhaps, as Trocino and Meyer suggest, the storm will continue growing offshore until it eventually makes landfall years down the road.[188] At some point, the Supreme Court should accept certiorari to clarify the meaning of the Eighth Amendment in this context and its distinction from the Sixth Amendment.[189] The longer that takes, the more likely it is that the meaning of this fundamental protection and cases that have attempted to safeguard it will get lost in the rubble.[190]

CONCLUSION

In the name of the Sixth Amendment, the U.S. Supreme Court's 2016 decision in *Hurst v. Florida* caused a seismic shift in Florida's capital sentencing scheme. Craig Trocino and Chance Meyer's

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185 *Id.* at 1130.

186 *See supra* Section II.B.

187 *See* Melanie Kalmanson, *Proper Procedure & Improper Punishment: Distinguishing the 6th and 8th Amendments in Capital Sentencing* [hereinafter Kalmanson, *Proper Procedure*] (unpublished manuscript) (on file with author).

188 Trocino & Meyer, *supra* note 1, at 1132 ("In each of these instances, Florida would have been better off making the tough decisions early and keeping decades-worth of unconstitutional death sentences from accumulating. The same is true now.") *See also* Kalmanson, *Proper Procedure*, *supra* note 188.

189 Trocino and Meyer, *supra* note 1, at 1129; *see also* Reynolds v. Florida, 139 S. Ct. 27, 32–36 (2018) (J. Sotomayor, dissenting).

190 *See Reynolds*, 139 S. Ct. at 32–36 (J. Sotomayor, dissenting) (Florida Supreme Court's "approach raises substantial Eighth Amendment concerns. As I continue to believe that 'the stakes in capital cases are too high to ignore such constitutional challenges' I would grant review to decide whether the Florida Supreme Court's harmless-error approach is valid in light of *Caldwell*.") (quoting Truehill v. Florida, 138 S. Ct. 3, 4 (2017)).

Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell*,* Clemons*, and* Profitt accurately predicted that the Supreme Court of Florida's work on remand in *Hurst* would directly affect the future of constitutional jurisprudence. Specifically, they predicted that the Eighth Amendment would be crucial in relief efforts after the *Hurst v. Florida* storm.

Unfortunately, as this Response has explained, the Court's strategy for clearing the debris insufficiently addressed the Eighth Amendment. As a result, the storm is likely not over. While the Supreme Court of Florida's jurisprudence following *Hurst* addressed the immediate questions, the way it did so was incomplete and, in part, unsound. This, in addition to significant climate change since *Hurst*, suggests that new storms are on the horizon. At the eye of these potential future storms is the Eighth Amendment and what it means for capital defendants in Florida and around the country.